Supreme Court, U.S.
FILED

961274 FEB 6 1997

OFFICE OF THE CLERK

No. 96-

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

DIGITAL EQUIPMENT CORPORATION,

Petitioner

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Respondent

Petition for a Writ of Certiorari to the
Supreme Court of Washington

PETITION FOR A WRIT OF CERTIORARI

Michael B. King
(Counsel of Record)
George C. Mastrodonato
Kathleen D. Benedict
Lane Powell Spears Lubersky LLP
1420 Fifth Avenue, Suite 4100
Seattle, Washington 98101-2338
(206) 223-7000

Counsel for Petitioner

aBCD Legal Printers, Seattle, Washington

QUESTION PRESENTED

This case arises out of this Court's decision in Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232 (1987), in which this Court held that the "multiple activities" exemption provisions of the State of Washington's Business and Occupation tax violated the Commerce Clause. After initially refusing on remand to give Tyler Pipe retroactive effect, the Supreme Court of Washington has now acknowledged in this case that taxpayers such as Petitioner Digital Equipment Corporation are entitled to retrospective relief. But the court has denied Digital a refund of the monies collected from it under what this Court held was a facially invalid taxing scheme, on the authority of a statute adopted by the Washington Legislature after the decision in Tyler Pipe. This statute was adopted for the express purpose of depriving taxpayers of their preexisting refund remedy, in the event a court ordered retrospective relief under Tyler Pipe.

The question presented is whether, under the Due Process Clause of the Fourteenth Amendment, a state may deny restitution of illegally exacted tax monies, based on a state rule of law which was adopted after the invalidation of the tax at issue, and for the express purpose of defeating taxpayer refund rights.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Washington Supreme Court were Digital Equipment Corporation and the State of Washington, by and through its Department of Revenue.

Under Supreme Court Rule 29.6, Digital Equipment Corporation states that it has no parent, and that its only non-wholly owned subsidiary is:

Digital Equipment (India) Ltd.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
REASONS FOR GRANTING THE WRIT	16
I. THE DECISION OF THE WASHINGTON SUPREME COURT CONFLICTS WITH THIS COURT'S DUE PROCESS CLAUSE PRECEDENTS	16
A. This Court's Decisions Establish That Taxpayers Have a Constitutionally Protected Right to a Refund of Illegally Exacted Tax Monies	16
B. The Washington Supreme Court's Retroactive Application of the Credit Law for the Express Purpose of Defeating Digital's Refund Rights Conflicts With This Court's Decisions	24

II. THE ISSUES RAISED BY THE WASHINGTON SUPREME COURT'S DECISION ARE RECURRING AND IMPORTANT 25

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

American Nat'l Can Corp. v. Department of Revenue, 114 Wash. 2d 236, 787 P.2d 545, cert. denied, 498 U.S. 880 (1990) 10, 11, 13

Armco Inc. v. Hardesty, 467 U.S. 638 (1984) 3, 4, 5, 10, 12

Ashland Oil, Inc. v. Rose, 177 W. Va. 20, 350 S.E.2d 531 (1986), rev'd after remand sub nom. Ashland Oil, Inc. v. Caryl, 497 U.S. 916 (per curiam) 10

Atchison, Topeka & Santa Fe Railway Co. v. O'Connor, 223 U.S. 280 (1912) 17, 18, 19, 27

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 22

Carpenter v. Shaw, 280 U.S. 363 (1930) 21

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 9, 12, 25, 26

Collector of Internal Revenue v. Hubbard, 79 U.S. (12 Wall) 1 (1871) 17

Collector of Internal Revenue v. Van Arsdale, 82 U.S. (15 Wall) 75 (1872) 17

Covell v. City of Seattle, 127 Wash. 2d 874, 905 P.2d 324 (1995) 15, 27

Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989) 26

Duffy v. Wetzler, 174 A.D.2d 253, 579 N.Y.S.2d 684 (applying Chevron Oil), appeal dismissed, 79 N.Y.2d 976, 583 N.Y.S.2d 190, 592 N.E.2d 798 (1992), but judgment vacated, 509 U.S. 917 (1993) 26

First of McAlester Corp. v. Oklahoma Tax Comm'n, 709 P.2d 1026 (Okla. 1985) 26

General Motors Corp. v. Washington, 377 U.S. 436 (1964) 2, 3

Griffith v. Kentucky, 479 U.S. 314 (1987) 9, 26

Harper v. Virginia Dept. of Taxation, 242 Va. 322, 410 S.E.2d 629 (1991), rev'd, 509 U.S. 86 (1993) 13, 25, 27

Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993) 12, 26

Hooper v. Bernalillo Cy. Assessor, 472 U.S. 612 (1985) 16

Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239 (1931) 21

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) 12, 13, 25, 26

Kentucky Revenue Cabinet v. CSC Oil Co., Inc., 851 S.W.2d 497 (Ky. App. 1993) 26

Marsh v. Fulton Cy. Board of Supervisors, 77 U.S. (10 Wall) 676 (1871) 17

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990) 13, 21, 22, 24, 25

Montana National Bank v. Yellowstone County, 276 U.S. 499 (1928) 20, 21

National Can Corp. v. Department of Revenue, 109 Wash. 2d 878, 749 P.2d 1286, cert. denied, 486 U.S. 1040 (1988) 8, 9, 10, 11, 12

National Can Corp. v. Dept. of Revenue, 105 Wash. 2d 327, 715 P.2d 128 (1986), amended, 732 P.2d 134 (1987), rev'd sub nom. Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232 (1987) 3, 4

Reich v. Collins, 513 U.S. ____, 130 L. Ed. 2d 454 (1994) 13, 15, 22, 23

Reynoldsville Casket Co. v. Hyde, 514 U.S. ____, 131 L. Ed. 2d 820 (1995) 13, 15, 23, 25

Salorio v. Glaser, 93 N.J. 447, 461 A.2d 1100, cert. denied, 464 U.S. 993 (1983) 26

Sheehy v. Montana Dept. of Revenue, 250 Mont. 437, 820 P.2d 1257 (1991), vacated, 509 U.S. 916 (1993) 26

Tyler Pipe Industries, Inc. v. Department of Revenue, 96 Wash. 2d 785, 638 P.2d 1213 (1982) 7

Tyler Pipe Industries, Inc. v. Dept. of Revenue, 105 Wash. 2d 318, 715 P.2d 123 (1986), rev'd, 483 U.S. 232 (1987) 3, 4

Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232 (1987) . . . . . passim

V-1 Oil Co. v. Idaho Petroleum Clean Water Trust Fund, 128 Idaho 890, 920 P.2d 909 (1996) 28

Ward v. Love County Board of Commissioners, 253 U.S. 17 (1920) 19, 20, 21

Yakima County Clean Air Authority v. Glascam Builders, Inc., 85 Wash. 2d 255, 534 P.2d 33 (1975) 8

CONSTITUTIONAL PROVISIONS AND STATUTES

28 U.S.C. § 1257 1

RCW 82.04.440 6

RCW 82.32.060 . . . . . 5, 7

RCW 82.32.090(1) 8

RCW 82.32.150 7

RCW 82.32.160 8

RCW 82.32.180 7

RCW 82.32.210 8

RCW 82.32.220 8

RCW 82.32.290(1) 8

RCW 82.32.290(2) 8

WAC 458-20-100 8

1985 Washington Laws, Reg. Sess.,
ch. 190, § 1 6

1987 Washington Laws,
2d Ex. Sess., ch. 3, § 3 6

MISCELLANEOUS AUTHORITY

O. Field, "The Recovery of Illegal and
Unconstitutional Taxes," 45 Harv.
L. Rev. 501 (1931-32) 16

O.W. Holmes, Jr., Collected Legal
Papers at 295-96 (New York:
Harcourt Brace & Howe 1920) 28

P. Tatarowicz, "Right to a Refund for
Unconstitutionally Discriminatory
State Taxes and Other Controversial
State Tax Issues Under the Commerce
Clause," 41 Tax Law. 103 (1987) 16

PETITION FOR A WRIT OF CERTIORARI

Digital Equipment Corporation ("Digital") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Washington in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Washington is reported at 129 Wash. 2d 177, and 916 P.2d 933. It is reprinted at pages 1a-38a of the appendix to this petition. The order of the Supreme Court of Washington, denying motions for reconsideration made by Digital and by the State of Washington Department of Revenue, is unreported and reprinted at page 39a of the appendix to this petition. The relevant orders of the Washington Superior Court for Thurston County are also unreported, and reprinted at pages 40a-45a and 46a-50a of the appendix to this petition.

JURISDICTION

The judgment of the Supreme Court of Washington was entered on May 23, 1996. Timely motions for reconsideration were denied on November 8, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

This case also involves various State of Washington statutory provisions, which have been reproduced in the appendix to this petition.

STATEMENT

This case represents the culmination of a series of legal challenges to Washington State's Business and Occupation ("B&O") tax. In Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232 (1987), this Court held that the B&O tax's scheme for taxing manufactured goods violated the Commerce Clause of the United States Constitution. This case seeks to establish that Washington has a constitutional obligation to repay monies collected from Digital, under color of taxing authority which this Court determined to have been unconstitutionally exercised.

The Invalidation by This Court of the "Multiple Activities" Exemption of Washington State's Business and Occupation Tax. In 1950, the Washington Legislature amended Washington's B&O tax. Under the amendment, local manufacturers paid the manufacturing B&O tax on their interstate sales, and the retailing (or wholesaling) tax on their Washington sales; out-of-state manufacturers also paid the retailing or wholesaling tax on their Washington sales, but received no exemption for manufacturing taxes paid to another state. Tyler Pipe, 483 U.S. at 236-37. This "multiple activities" taxation scheme narrowly survived a challenge to its constitutionality in General Motors Corp. v. Washington, 377 U.S. 436 (1964). A bare majority of this Court upheld the tax; Justice Goldberg, joined by Justices Stewart and White, dissented because "'[t]he burden on interstate commerce and the dangers of multiple taxation' were apparent from the face of the statute." General Motors Corp., 377 U.S. at 459 (Goldberg, J., dissenting), as cited and quoted in Tyler Pipe, 483 U.S. at 237-38 (edits this Court's).[1]

---

[1]Justice Brennan also dissented in General Motors, and on Commerce Clause grounds, but did not reach the facial discrimination issue. See 377 U.S. at 449-51 (Brennan, J., dissenting).

Twenty years later, in Armco Inc. v. Hardesty, 467 U.S. 638 (1984), this Court invalidated West Virginia's wholesale gross receipts tax. West Virginia imposed a wholesale tax on goods sold in the state; local manufacturers were exempt from this tax, but paid a separate tax on goods manufactured in the state. Citing with approval Justice Goldberg's dissent in General Motors Corp. v. Washington, this Court struck down West Virginia's tax as facially invalid under the Commerce Clause. 467 U.S. at 642-46.

Following Armco, a group of manufacturers[2] challenged Washington's "multiple activities" taxation scheme, contending it could no longer withstand constitutional scrutiny. The Supreme Court of Washington rejected this challenge, on the grounds that Armco should not be read to "effectively overrule . . ., sub silentio, . . . 30 years of [United States] Supreme Court doctrine":

> Due to factual differences between the West Virginia tax challenged in Armco . . . and the Washington tax, we do not believe the United States Supreme Court is requiring us to forge new [C]ommerce [C]lause doctrine and disregard earlier decisions not overruled.

National Can Corp. v. Dept. of Revenue, 105 Wash. 2d 327, 715 P.2d 128, 131 (1986), amended, 732 P.2d 134 (1987); see also Tyler Pipe Industries, Inc. v. Dept. of Revenue, 105 Wash. 2d 318, 715 P.2d 123 (1986).[3]

---

[2]Petitioner Digital Equipment Corporation was not a party to this challenge.

[3]National Can involved 53 separate refund actions, brought by three types of claimants: (1) in-state manufacturers who manufactured their products in Washington, and sold them out of state; (2) out-of-state manufacturers who manufactured their products outside Washington and sold them in state; and (3) out-of-state manufacturers who manufactured products in Washington for sale out of state, and who also manufactured products outside

(continued...)

This Court reversed, holding that Armco did require the invalidation of Washington's tax, as a facial violation of Commerce Clause strictures:

> In explaining why the [West Virginia] tax was discriminatory on its face, we expressly endorsed the reasoning of Justice Goldberg's dissenting opinion in General Motors Corp. v. Washington . . . .
>
> . . . .
>
> Our square reliance in Armco on Justice Goldberg's earlier dissenting opinion is especially significant because that dissent dooms appellee's [i.e., Washington's] efforts to limit the reasoning of Armco to the precise statutory structure at issue in that case.
>
> . . . .
>
> To the extent that this conclusion is inconsistent with the Court's ruling in the General Motors case, that case is overruled.

Tyler Pipe, 483 U.S. at 241, 248.[4] This Court did not expressly

---

[3](...continued)
Washington for sale in state. National Can, 715 P.2d at 129-30. The taxpayer in the companion case of Tyler Pipe Industries, Inc. v. Dept. of Revenue, 105 Wash. 2d 318, 715 P.2d 123 (1986), fell within the second category. Tyler Pipe Industries, Inc., the plaintiff in the companion case before the Washington Supreme Court, then became the lead party in the proceedings before this Court.

[4]In a following footnote, this Court stated that "[i]n view of our holding on the discrimination issue, we need not reach the claim of local state manufacturers selling to interstate markets that (continued...)

reserve the question of whether its decision should apply only prospectively, but remanded to the Washington Supreme Court for determination of the remedy to be provided the successful taxpayer litigants. Tyler Pipe, 483 U.S. at 251-53.[5]

The Washington Legislature's Response to the Invalidation of the "Multiple Activities" Taxation Scheme. Even before this Court's decision in Tyler Pipe, the Washington Legislature took steps to minimize the fiscal consequences of an adverse ruling. At the time this Court decided Armco, Washington provided the retrospective remedy of a full refund for the illegal exaction of tax monies. See Revised Code of Washington ("RCW") 82.32.060 (reprinted at pages 59a-60a of the appendix to this petition).[6] Following Armco, the Washington Legislature amended the multiple activities taxation scheme, and authorized a system of compensating credits to go into effect if the tax were invalidated on Commerce Clause grounds. As introduced in the 1985 regular session of the Legislature, Substitute Senate Bill ("SSB") 3678 proposed to provide a credit against taxes paid to another state "with respect to the sales of the products so extracted or manufactured in this state[,]" for "tax reporting periods after July 1, 1985." SSB 3678 (subsection (4)) (SSB 3678 is reprinted at pages 51a-52a of the appendix to this petition). This proposal was revised, and the measure as adopted provided a credit only if "a court of competent jurisdiction, in a judgment not

---

[4](...continued)
the tax scheme does not fairly apportion tax liabilities between Washington and other states." See 483 U.S. at 248, n.16.

[5]Because "[c]ompliance with [the Court's] . . . holding on the discrimination issue . . . would not necessarily preclude the continued assessment of a wholesaling tax[,]" this Court reached -- and rejected -- the Due Process Clause challenge raised by the taxpayer in the companion case to the consolidated National Can refund actions. See Tyler Pipe, 483 U.S. at 248-51.

[6]Washington's tax remedy structure is described more fully, infra, at 7-8.

subject to review," determined that the multiple activities exemption "result[ed] in an unconstitutional discrimination against interstate or foreign commerce[,]" and "that relief [was] . . . appropriate for any tax reporting periods either before or after the effective date of th[e] 1985 [amendments] . . . ." 1985 Washington Laws, Reg. Sess., ch. 190, § 1 (subsection (4)) (Chapter 190, Section 1 is reprinted at pages 53a-54a of the appendix to this petition).

The Legislature, however, did not provide for these credits to be substituted for refunds as the sole remedy for any illegal taxation found to have been conducted under the multiple activities scheme. Two years later, this Court issued its decision in Tyler Pipe invalidating the scheme. In response, the Washington Legislature met in a special session and made additional changes to the state's B&O tax system, including to the remedy provisions that had been adopted two years before. Because this Court had left the question of remedy for the Washington Supreme Court on remand, the Legislature structured the new remedy provisions to account for the resulting uncertainty about the ultimate scope of court-ordered relief on remand. This time, the Legislature expressly declared its intent that the credit remedy should be the exclusive remedy for illegal taxation if Tyler Pipe was applied retroactively:

> If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that relief is appropriate for any tax reporting periods before the effective date of this act, in respect to RCW 82.04.440 [i.e., the multiple activities exemption statute] as it existed before the effective date of this act, it is the intent of the legislature that the credits provided in RCW 82.04.440 as amended by section 2 of this act shall be applied to such reporting periods and that relief for such periods be limited to the granting of such credits.

1987 Washington Laws, 2d Ex. Sess., ch. 3, § 3 (Chapter 3 is reprinted at pages 55a-58a of the appendix to this petition).

Digital's Suit for a Refund of Taxes Paid Under the "Multiple Activities" Taxation Scheme, Following Its Invalidation by This Court. Digital is a Massachusetts corporation, that designs, manufactures, sells and services computers, associated peripheral equipment, and related software and supplies. During the tax reporting periods in question, Digital manufactured products and product components outside Washington, and sold these manufactured goods in Washington to end-users (consumers) as well as to persons who resold the goods (wholesalers); Digital paid retailing and wholesaling B&O taxes on these transactions, estimated to total $1,706,877.[7] On August 27, 1987, Digital filed suit in the Superior Court for Thurston County, seeking a refund of these taxes, which were paid prior to the issuance of Tyler Pipe.

As stated, when Digital paid the taxes at issue, Washington provided only the postdeprivation remedy of a refund for unlawfully exacted taxes. See RCW 82.32.060. Under Washington law, a court may provide relief from illegal taxation only after the disputed taxes have been paid. RCW 82.32.180, reprinted at pages 63a-64a of the appendix to this petition.[8] A

---

[7]This amount has not been verified by the Washington State Department of Revenue, and if Digital is held to be entitled to a refund of the taxes at issue, the Department will have the right to verify the claimed amount prior to payment. Digital will also receive interest on any refunded taxes at the rate established by RCW 82.32.060.

[8]Although RCW 82.32.150 (reprinted at page 62a of the appendix to this petition) provides for the possibility of injunctions in tax relief suits, the Supreme Court of Washington has held such an injunction generally will not issue because Washington "provides the legal remedy of a refund suit." Tyler Pipe Industries, Inc. v. Department of Revenue, 96 Wash. 2d 785, 638 P.2d 1213, 1216 (1982). And while Washington also has an administrative procedure for contesting tax assessments without

(continued...)

penalty of up to twenty percent is imposed for a deficient or delinquent tax payment. RCW 82.32.090(1), reprinted at pages 60a-61a of the appendix to this petition. The Department of Revenue may issue a tax warrant any time a tax is fifteen days overdue; the warrant is filed in the Superior Court and becomes an automatic judgment against the taxpayer. RCW 82.32.210, reprinted at pages 64a-66a of the appendix to this petition. The Department may execute upon this warrant (including seizing and selling property of the taxpayer), and may revoke a taxpayer's certificate of registration if a warrant is not paid within thirty days. RCW 82.32.220, reprinted at pages 66a-67a of the appendix to this petition. Under Washington law, it is unlawful for a corporation to do business without a certificate of registration, and it is a Class C felony to violate this requirement. RCW 82.32.290(1), (2), reprinted at pages 67a-68a of the appendix to this petition.

The Washington Supreme Court's Initial Denial of Retrospective Relief, on Remand From This Court in Tyler Pipe. The year after this Court's decision in Tyler Pipe, the Washington Supreme Court issued its decision on the remedy issue. In National Can Corp. v. Department of Revenue, 109 Wash. 2d 878, 749 P.2d 1286 (1988),[9] the court held that Tyler

---

[8](...continued)
first paying the disputed tax, the Washington Supreme Court has ruled that administrative agencies may not rule on the constitutionality of statutes. Compare RCW 82.32.160 and Washington Administrative Code 458-20-100 (the former is reprinted at pages 62a-63a of the appendix to this petition) with Yakima County Clean Air Authority v. Glascam Builders, Inc., 85 Wash. 2d 255, 534 P.2d 33, 34 (1975).

[9]Tracking the prior decisions of the Washington Supreme Court issued during the extended course of the multiple activities exemption litigation is made difficult by the repetitive party nomenclature -- particularly the recurrence of lead taxpayer parties with the term "Can" in their names. Digital will refer to the
(continued...)

Pipe would be given only prospective effect, thereby denying any relief for taxes paid prior to the Tyler Pipe judgment. See 749 P.2d at 1288. Acknowledging that this Court's decision in Griffith v. Kentucky, 479 U.S. 314 (1987), had "reworked" the test for retroactive application in criminal cases, the Washington Supreme Court nonetheless held that "the inquiry in civil cases is still controlled" by the three factor balancing test set forth in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). See 749 P.2d at 1288. The Supreme Court of Washington held that, under the Chevron Oil test, the decision in Tyler Pipe should be given only prospective effect:

First, the court found Tyler Pipe had "establish[ed] new principles of law." 749 P.2d at 1288.

Second, the court found that the purpose of the Commerce Clause would not be furthered by retroactive application, "since whatever chill was imposed on interstate trade is in the past and the Legislature has enacted law [sic] to attempt to comport with the new commerce clause taxation laws announced in Tyler [i.e., the 1987 amended credit law]." 749 P.2d at 1291.

Third, the court found it would be inequitable to give Tyler Pipe retroactive application, because "the expenditures made from this revenue during the many years for which refunds are sought cannot be undone, and reimbursement at this point would pose a significant hardship upon the State's existing financial

---

[9](...continued)
Washington Supreme Court's 1986 decision (reversed by this Court in Tyler Pipe) as "National Can I," to the court's post-Tyler Pipe remedy decision as "National Can II," and to the (yet to be discussed) decision upholding the validity of the 1987 credit law (against a variety of federal and state law challenges not directly relevant to this case) as "American Can."

requirements." 749 P.2d at 1293 (citing Salorio v. Glaser, 93 N.J. 447, 461 A.2d 1100, cert. denied, 464 U.S. 993 (1983)).[10]

This Court denied the Tyler Pipe taxpayers' petition for a writ of certiorari. See order reported at 486 U.S. 1040 (1988).[11] Two years later, the Washington Supreme Court refused refunds for the six week period between this Court's Tyler Pipe decision (which issued June 23, 1987) and the date the Legislature's amended credit legislation went into effect (August 11, 1987). See American Nat'l Can Corp. v. Department of Revenue, 114 Wash. 2d 236, 787 P.2d 545, 546 (1990). Although the resolution of this claim for "interim period" refunds turned solely on questions of state constitutional law, see 787 P.2d at 553, the Washington Supreme Court's rejection of refunds was expressly based on its finding that the Legislature intended the credit law to apply

---

[10]The court estimated the illegally collected taxes in question at $56 million for the pending cases, and in excess of $423 million for the period 1980-84. See 749 P.2d at 1293. Although the court did not explain why the period 1980-84 was relevant, given Tyler Pipe was decided in 1987 and Washington has a four year statute of limitations on refund claims, the reference is probably explained by the fact that refund claims had been filed immediately after Armco, seeking refunds for taxes paid back to 1980.

[11]Two years before, the Supreme Court of Appeals of West Virginia had refused to give retroactive effect to this Court's decision in Armco (a refusal cited with approval by the Washington Supreme Court in National Can II); in 1990, this Court reversed the West Virginia Supreme Court of Appeals, and held Armco should be given retroactive effect. See Ashland Oil, Inc. v. Rose, 177 W. Va. 20, 350 S.E.2d 531 (1986), rev'd after remand sub nom. Ashland Oil, Inc. v. Caryl, 497 U.S. 916, 918 (per curiam) ("Applying the view of retroactivity delineated by either the dissent or the plurality in American Trucking Assn's, [Inc. v. Smith, 496 U.S. 167 (1990),] we must reverse the state court's decision").

retroactively in the event a court ordered a remedy for a taxing period prior to the credit law's effective date:

> Section three of the law [i.e., the 1987 credit law] shows that the Legislature intended to apply relief retroactively in the event of a court-ordered remedy notwithstanding the effective date of the act. . . .
>
> Given the holding of the Tyler [Pipe] Court, some relief is clearly appropriate. Our determination that some relief is appropriate triggers both the 1985 and 1987 legislation.

787 P.2d at 552.[12] This Court denied the American Can taxpayers' petition for a writ of certiorari. See order reported at 498 U.S. 880 (1990).[13]

Proceedings in This Case Before the Washington Trial Court. This case remained dormant until 1994, when Digital moved for partial summary judgment on its refund claim, and the Department of Revenue filed a cross-motion for a summary judgment of dismissal.[14] The ensuing controversy before the Thurston County Superior Court principally concerned whether the Washington Supreme Court's decision in National Can II had been fatally undermined by subsequent decisions of this Court addressing the retroactive effect of the Court's decisions in civil

---

[12]The taxpayers also challenged the prospective application of the credit law, on various state and federal grounds, which the Washington Supreme Court also rejected. See 787 P.2d at 553.

[13]Most of the parties in American Can were also parties in Tyler Pipe, and in the National Can II remand proceeding. Petitioner was not a party to any of these proceedings.

[14]Digital's was one of many actions filed in the wake of Tyler Pipe. After the Washington Supreme Court denied retrospective relief in National Can II, some of these cases were dismissed. The Washington State Department of Revenue, however, failed to pursue the dismissal of Digital's case and several other cases.

cases.[15] Digital contended these subsequent decisions had repudiated Chevron Oil's three-factor balancing test, substituting a presumption of retroactivity which might be overcome only by an express reservation of the retroactivity question in the decision at issue: Because this Court did not expressly reserve retroactivity in Tyler Pipe, the decision therefore now had to be given retroactive effect under the governing "express reservation" test. The Thurston County Superior Court, however, held Chevron Oil still applied to what the court called cases of "pure prospectivity," declaring that Tyler Pipe was such a case. See court's letter opinion (the letter opinion is reprinted at pages 40a-45a of the appendix to this petition). The court denied Digital's motion, granted the Department's motion, and dismissed Digital's action.

Proceedings in This Case Before the Washington Supreme Court. The Supreme Court of Washington granted direct review of the Superior Court's decision. On May 23, 1996, the court affirmed the dismissal of Digital's refund claim. In his opinion for the court, Justice Charles Smith agreed with Digital that National Can II had been fatally undermined by this Court's subsequent retroactivity decisions, and that Tyler Pipe therefore had to be given retroactive effect. 916 P.2d at 936-38 (pages 5a-11a of the appendix to this petition).[16] The court

---

[15]E.g., Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991).

[16]Justice Smith's opinion was joined by Justices James Dolliver and Charles Johnson. Chief Justice Barbara Durham, in a concurring opinion joined by Justice Gerry Alexander, agreed that National Can II should be overruled in light of this Court's subsequent retroactivity decisions. See 916 P.2d at 941-42, n.1. Chief Justice Durham, however, believed that the relevant decision of this Court to be applied retroactively was Armco, not Tyler Pipe. Id. at 942 n.1 (pages 20a-21a of the appendix). Justice Richard Guy, joined by Justices Barbara Madsen, Roselle Pekelis (continued...)

acknowledged that Digital therefore "conceivably might be entitled to some type of relief. . . ." Id. at 938 (page 12a of the appendix to this petition). But the court did not agree that due process compelled a refund to Digital of the monies illegally exacted from it during the pre-Tyler Pipe taxing periods at issue.

Consistent with its prior ruling in American National Can, the court held that the Washington Legislature "intended that the [1987 credit] law would operate retroactively in the event of a court-ordered remedy" and that the Legislature "also intended that these tax credits would be the exclusive remedy available for those entitled to relief." Id. at 935 (page 3a of the appendix to this petition) (emphasis added) (footnotes omitted). The court then held that the Legislature acted consistent with due process when it substituted the new credit remedy for the usual refund remedy -- a substitution that the court expressly acknowledged was only to take effect for pre-Tyler Pipe tax reporting periods if a court subsequently held that Tyler Pipe must be given retroactive effect.[17]

---

[16](...continued)
(pro tem) and Phillip Talmadge, dissented from the decision to overrule National Can II, but agreed with Justices Smith, Dolliver and Johnson that the issue was whether to apply Tyler Pipe retroactively. See 916 P.2d at 947-49 (pages 32a-37a of the appendix). Thus, a majority of the court agreed that National Can II should be overruled on the issue of retroactivity (principally in light of this Court's decisions in Beam and Harper), and a majority (albeit a different one) agreed that overruling National Can II would give retroactive effect to Tyler Pipe.

[17]In rejecting Digital's due process challenge to this "after the fact" elimination of the company's refund remedy, the court discussed this Court's decision in McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990), but did not address this court's later decisions in Reich v. Collins, 513 U.S. ___, 130 L. Ed. 2d 454 (1994) or Reynoldsville Casket Co. v. Hyde, 514 U.S. ___, 131 L. Ed. 2d 820 (1995) -- even though
(continued...)

The court also asserted that consideration of the remedy issue had been rendered "acutely academic":

> . . . when counsel for Digital during oral argument conceded that Digital had not been "double taxed" and consequently suffered no injury under the former unconstitutional tax scheme.

Id. at 940 (page 16a of the appendix to this petition) (footnote omitted).

Digital timely moved for reconsideration.[18] First, Digital pointed out it had not conceded the absence of injury. According to the court:

> One of the justices asked *"In your particular situation, did your client actually pay out-of-state gross receipt taxes on its manufacturing operations?"* Counsel for Digital then replied *"We were not actually double taxed."*

Id. (italics the court's). The oral argument transcript[19] showed counsel did not make this admission:

---

[17](...continued)
both cases were relied upon by Digital in briefing and at oral argument.

[18]The Department of Revenue also moved for reconsideration, asking the court to reconsider its ruling on the retroactivity issue.

[19]Oral arguments before the Washington Supreme Court are videotaped and transcripts are prepared upon counsel's request. Digital's counsel requested a transcript be prepared, and submitted a copy in support of reconsideration. In addition to the portion quoted, the issue of Digital's injury was further addressed by Digital's counsel, and those remarks are also reprinted in the appendix to this petition at pages 69a-74a.

> [Counsel for Digital]: We were not actually double taxed, but that goes to the question of remedy, Your Honor. . . .
>
> . . . Your Honor's question introduces a second issue, and that's the nature of the harm. . . .
>
> Now, as to the question of injury, I think we're missing a fundamental point here if we buy into the state's analysis that somehow we're asking for a windfall, to be given back money when we weren't injured.
>
> We most certainly were injured. Digital's money was taken under color of taxing authority later held to be unconstitutional.

See excerpts of oral argument transcript reprinted in the appendix to this petition, at page 70a (emphasis added).[20]

Second, Digital urged the court to reconsider in light of this Court's decisions in Reich and Reynoldsville, which had not been addressed in the court's opinion or Chief Justice Durham's concurrence.[21] Digital also observed that, since the close of briefing and argument, the court had granted retroactive refund relief to local taxpayers in a suit challenging the constitutionality of a municipal tax. See Covell v. City of Seattle, 127 Wash. 2d 874, 905 P.2d 324, 333 (1995). Digital suggested that the grant of retroactive refund relief in Covell, combined with the denial of

---

[20]Chief Justice Durham also disputed the implication of Justice Smith's opinion for the Court, that Digital needed to suffer double taxation in order to demonstrate injury. See 916 P.2d at 946, n.6 (pages 27a-28a of the appendix). Justice Guy's dissent did not address the issue.

[21]Justice Guy's dissent cited Reynoldsville's discussion of retroactivity, but did not address either Reich's or Reynoldsville's analysis of the constitutional limits placed on a state's power to deny retroactive relief.

such relief in this case, could give rise to a violation of the Privileges and Immunities Clause. See generally Hooper v. Bernalillo Cy. Assessor, 472 U.S. 612 (1985), cited in Digital's reconsideration motion.

On November 8, 1996, the court denied any reconsideration; the court did not give any reasons for its ruling, and also did not modify any portion of its decision. App. 39a.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the constitutionality of state efforts to evade refunding illegally collected taxes.

I. THE DECISION OF THE WASHINGTON SUPREME COURT CONFLICTS WITH THIS COURT'S DUE PROCESS CLAUSE PRECEDENTS.

A. This Court's Decisions Establish That Taxpayers Have a Constitutionally Protected Right to a Refund of Illegally Exacted Tax Monies.

The history of actions to recover illegally collected state taxes shows a deep-rooted reluctance on the part of state authorities, including state courts, to refund such monies. See, e.g., P. Tatarowicz, "Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause," 41 Tax Law. 103 (1987); O. Field, "The Recovery of Illegal and Unconstitutional Taxes," 45 Harv. L. Rev. 501 (1931-32). This Court's decisions dealing with refund claims for state and federal taxes illustrate the tension between individual and state interests inherent in such disputes. On the one hand, there is the fundamental principle that:

> [t]he obligation to do justice rests upon all persons, natural and artificial, and if a county [i.e., a taxing authority] obtains the money or property of others without authority,

> the law, independent of any statute, will compel restitution or compensation.

Marsh v. Fulton Cy. Board of Supervisors, 77 U.S. (10 Wall) 676, 684 (1871). On the other hand, the practical concern for disrupting the process of collection of public revenues has sometimes moved this Court to express the view that remedies for improper taxation must be generally subject to wide-ranging modification by legislative authorities. See, e.g., Collector of Internal Revenue v. Hubbard, 79 U.S. (12 Wall) 1, 14 (1871).

The history of tax refund jurisprudence, however, also discloses a shift by this Court in favor of protecting taxpayer rights. Although the right of taxpayers to some sort of relief was acknowledged early on, initially this right was rather severely circumscribed by an evident reluctance to interfere in legislative choices defining -- and usually limiting -- the scope of such remedies. Compare Collector of Internal Revenue v. Van Arsdale, 82 U.S. (15 Wall) 75, 77 (1872) ("Taxes illegally assessed and paid may always be recovered back, if the collector understands from the payer that the taxes are regarded as illegal and that suit will be instituted to compel the refunding") with Hubbard, 79 U.S. at 14 ("Remedies of the kind, given by Congress, may be changed or modified, or they may be withdrawn altogether at the pleasure of the law-maker, as the taxpayer cannot have any vested right in the remedy granted by Congress for the correction of an error in taxation"). But, starting no later than the decision in Atchison, Topeka & Santa Fe Railway Co. v. O'Connor, 223 U.S. 280 (1912), this Court began to move away from the traditional view so deferential to the interests of the tax collector, to embrace a doctrine more solicitous of taxpayer rights.

In the Atchison, Topeka & Santa Fe Railway case, the issue was whether the taxpayer (the railroad) had paid the disputed tax under "duress," which at the time was a well-nigh universal precondition for refund relief. 223 U.S. at 285.[22] The railroad

---

[22]Although Digital questions whether the traditional (continued...)

challenged a tax levied by the state of Kansas, of two cents upon each thousand dollars of the company's capital stock. Id. Kansas did not dispute the tax had been unconstitutionally assessed and collected from the railroad, but did claim the railroad had paid the tax voluntarily and therefore was not entitled to the remedy of a refund. Id. In rejecting this claim, Justice Holmes stated for a unanimous court:

> It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that apart from special circumstances he cannot interfere by injunction with the State's collection of its revenues, an action at law to recover back what he has paid is the alternative left. Of course we are speaking of those cases where the state is not put to an action if the citizen refuses to pay. In these latter [cases,] he can interpose his objections by way of defense, but when, as is common, the State has a more summary remedy, such as distress, and the party indicates by protest that he is yielding to what he cannot prevent, courts sometimes perhaps have been a little too slow to recognize the implied duress under which payment is made. But even if the State is driven to an action, if at the same time the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his constitutional, rights, by defense in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms.

Id. at 285-86 (citations omitted) (emphasis added).

---

[22](...continued)
requirement of duress can any longer be squared with the modern due process basis of tax refund jurisprudence, Digital notes that issue need not be addressed in this case, because (as is noted, infra, at n.23), Digital has satisfied the "duress" requirement.

The Court found the railway did not voluntarily pay the taxes at issue, given the company would forfeit its right to do business within the state of Kansas, and suffer a penalty of ten percent each six months until the taxes were paid. Id. at 286.[23] The Court also rejected the state's claim that the railway's monies somehow became the state's, merely by the act of collection:

> It is said that the money as soon as collected belonged to the state. Very likely it would have but for the plaintiff's claim, assuming it to remain an identified trust fund; but the plaintiff's claim was paramount to that of the State . . .

Id. at 287 (emphasis added).

Within the next several years, the decision in the Atchison, Topeka & Santa Fe Railway case was followed by a series of decisions, confirming what Justice Holmes' language plainly implied -- fundamental principles of due process circumscribe the power of taxing authorities to refuse a refund of taxes illegally exacted:

- In Ward v. Love County Board of Commissioners, 253 U.S. 17 (1920), this Court reversed the Oklahoma Supreme Court's refusal to award a refund for an unlawful tax. This Court explained the state's duty to remit the tax as follows:

> It is a well settled rule that "money got through imposition" may be recovered back; and, as this court has said on several occasions, "the obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." . . . . To say that the county could

---

[23]This holding probably explains why the Department, given Washington's equally onerous penalty scheme (see pp. 7-8, supra), has never claimed in this case that Digital "voluntarily" paid the taxes at issue.

> collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course, this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the State.

253 U.S. at 24 (citations omitted).

- In Montana National Bank v. Yellowstone County, 276 U.S. 499 (1928), this Court again reversed a refusal to award a refund of an unlawful tax. There, the Montana Supreme Court had overruled its prior decision barring the collection from state chartered banks of a tax on bank shares which had been collected from federally chartered banks, but then refused to award a refund because state tax authorities had declined to collect the tax from state chartered banks in reliance on the Montana Supreme Court's prior decision. 276 U.S. at 504-05. This Court held that the change in state law could not deprive the taxpayer of a refund of the wrongfully collected taxes:

> It is true that the state supreme court in the present case expressly repudiated the construction theretofore put by it upon the state statutes . . . . But that does not cure the mischief which had been done under the earlier construction. That construction had already been acted upon by the taxing officials and the application thus made of the statutes had given rise to the present cause of action and an undoubted right to recover thereon. The statutes, as thus construed and applied to the concrete facts of the case, were invalid; and this is enough to justify the challenge here under consideration. . . . Plaintiff in error cannot be deprived of its legal right to recover the amount of the tax unlawfully exacted of it by the later decision which . . . leaves the monies thus exacted in the public treasury.

276 U.S. at 504.

• In Carpenter v. Shaw, 280 U.S. 363 (1930), a case analogous to Ward, this Court reversed another refusal to award a refund of an unlawful tax, holding that:

> a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment.

280 U.S. at 369.

• In Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239 (1931), this Court reversed another refusal to award a refund of an unlawful tax (in that case, a claim only for the discriminatory excess collected from the complaining taxpayers). This Court held that the mere power of the state to rectify the discrimination, by retroactive collection from those who were taxed at the lesser rate, did not relieve the state of its constitutional obligation to pay the claimed refund:

> . . . a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. . . . Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative.

284 U.S. at 247 (citations omitted).[24]

After this series of decisions, this Court did not "ha[ve] occasion . . . to explain the scope of a state's obligation to provide retrospective relief as part of its postdeprivation procedure" until McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990). See 496 U.S. at 32. But as this Court made

---

[24]A similar claim had been made, and also rejected, in Montana National Bank. See 276 U.S. at 505.

clear in McKesson, the Court's "approach today is rooted firmly" in the precedents just described. Id. This Court stated in McKesson:

> Because exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause.

Id. at 36 (footnote omitted). McKesson thus makes plain that due process places substantial limits on a state's ability to refuse a refund. If the state affords a predeprivation remedy that satisfies due process (e.g., the right to a precollection administrative remedy, in which constitutional issues may be addressed), then the issue should not arise. See id. at 38, n.21. But if no such predeprivation opportunity exists, then "the Due Process Clause . . . obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." Id. at 31 (footnote omitted). In providing such relief, a state must either award full refunds to those burdened by an unlawful tax or issue some other order that "create[s] in hindsight a nondiscriminatory scheme." Id. at 40.

In McKesson, the validity of a state's choice of a specific remedy was not at issue, because the state (Florida) had not yet elected between a refund or an equivalent compensatory measure. The sole issue before the Court was whether, given the retroactive effect of this Court's invalidation of discriminatory liquor excise tax schemes in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), a state could nonetheless refuse to provide retroactive relief.[25] But in Reich v. Collins, 513 U.S. ___, 130 L. Ed. 2d 454 (1994), this Court did address an attempt by a state to change its remedy rules after the fact, to avoid paying a refund. The Georgia Supreme Court had refused a refund remedy on the

---

[25]The taxpayers in McKesson also only claimed retrospective relief for the discriminatory effect of Florida's liquor excise tax. 496 U.S. at 25.

grounds that Georgia's predeprivation remedies were the exclusive remedy for cases involving challenges to taxes on grounds of invalidity (constitutional or otherwise). 130 L. Ed. 2d at 457-58. This Court held that the Georgia court's decision constituted a departure from settled principles of Georgia law (under which taxpayers would reasonably have assumed a refund was available, and therefore would not have availed themselves of any predeprivation procedures), and that the Due Process Clause forbade such an unfair attempt to reconfigure taxpayer remedy schemes "in midcourse -- to 'bait and switch,' as some have described it." Id. at 459.

In short, Reich establishes that due process does limit a state's ability to make after-the-fact changes in their remedy scheme, to avoid paying a refund of illegally exacted tax monies. Most recently, in Reynoldsville Casket Co. v. Hyde, 514 U.S. ___, 131 L. Ed. 2d 820 (1995), this Court dealt with the closely related issue of when a state may refuse to give retroactive effect to a decision of this Court in a civil case, whose retroactivity was not expressly reserved. This Court addressed when it would be appropriate for a state to refuse refunds "under a taxing statute that this Court later holds unconstitutional":

> Retroactive application of the Court's holding would seem to entitle the taxpayers to a refund of taxes. But, what if a pre-existing, separate, independent rule of state law, having nothing to do with retroactivity . . . nonetheless barred the taxpayers' refund suit? . . . . Depending upon whether or not this independent rule satisfied other provisions of the Constitution, it could independently bar the taxpayers' refund claim.

131 L. Ed. 2d at 828-29. In other words, a state may not refuse a refund, based on a rule of state law adopted after the fact and for the express purpose of defeating a refund, because the result would defeat the state's restitutionary obligation which lies at the foundation of this Court's tax refund due process jurisprudence.

B. The Washington Supreme Court's Retroactive Application of the Credit Law for the Express Purpose of Defeating Digital's Refund Rights Conflicts With This Court's Decisions.

The 1987 credit law is the only alternative to a refund proffered by the State of Washington. The Department has never suggested that the State will (or even can, under state law) seek to impose a retroactive, "compensatory" tax. Nor would such a tax be responsive to Digital's injury, which is the taking of its money under color of state taxing authority that has been invalidated on its face. Nonetheless, the credit law has been applied in this case to avoid refunding to Digital the monies illegally collected from it during the pre-Tyler Pipe taxing periods -- monies which Digital would have been entitled to receive as a refund prior to the enactment of the credit law.

This result conflicts with this Court's tax refund due process jurisprudence. First, the credit law is the antitheses of a preexisting, independent rule of state law having nothing to do with retroactivity: The law was passed after Tyler Pipe and for the express purpose of defeating the payment of refunds if a court ever required retroactive relief under Tyler Pipe. Second, the credit law's application disregards the long-standing principle that monies illegally collected are not the property of the taxing authority: They remain the property of the taxpayer, and the taxing authority has the obligation to make restitution of those funds.

As Chief Justice Durham recognized in her concurrence below, Digital was injured even though the company did not pay a double tax for which it would be entitled to relief under the 1987 credit law. 916 P.2d at 945, n.6 (pages 27-28a of the appendix to this petition). The credit law does nothing to address that injury, and its application deprives Digital of redress for the injury of having its monies taken under a facially invalid tax scheme.[26]

---

[26]In McKesson, this Court indicated that, in some Commerce

(continued...)

The Washington Supreme Court's application of the credit law to Digital therefore conflicts with this Court's decisions.

II. THE ISSUES RAISED BY THE WASHINGTON SUPREME COURT'S DECISION ARE RECURRING AND IMPORTANT.

This Court noted in McKesson that for some time the Court had no occasion to address due process issues in tax challenge cases, because the Court developed a practice of referring the question of remedy back to the state courts for their disposition. 496 U.S. at 32 n.16. This practice was closely intertwined with the Court's experiment with determining the retrospective effect of decisions on a case-by-case basis. Under the resulting regime of multifactor balancing exemplified by Chevron Oil Co. v. Huson, it made sense for this Court to abstain from addressing the remedy issue, since the state court was often afforded the first opportunity to determine a decision's retrospective effect.

This Court's decisions in Beam, Harper, and Reynoldsville make plain that the experiment in case-by-case retrospectivity has come to an end, in the civil as well as the criminal sphere.[27]

---

[26](...continued)
Clause context circumstances, due process could be satisfied by collecting back taxes from in-state competitors, or by refunding the difference between the tax paid and the tax that would have been assessed had the out-of-state taxpayer been taxed at the same rate as in-state competitors. 496 U.S. at 40-41. As stated, the Department has never suggested it could -- much less would -- consider collecting back taxes. This case also presents the question of a remedy for a facially invalid taxing scheme, not just for the discriminatory effect of a tax as applied to specific tax transaction, which triggers the restitutionary obligation imposed by Due Process Clause requirements established by this Court's precedents.

[27]In Harper, this Court explained that its adoption of the (continued...)

With the end of the Chevron Oil era, the issue of remedy has acquired new urgency. Bluntly put, states used Chevron Oil's multifactor balancing approach to avoid granting refunds in federal question tax challenge cases, repeatedly striking the balance against the taxpayer and in favor of the state treasury, and thereby effectively gutting taxpayer rights.[28] Nor has the abolition of

---

[27](...continued)
express reservation approach (under which a decision must be given retroactive effect unless the issue has been expressly resolved by the decision in question) was impelled by the difference between judicial and legislative action under a constitutional scheme that limits the exercise of judicial power to individual cases and controversies. See Harper, 509 U.S. at 104 (adopting Justice Harlan's critique of case-by-case retrospectivity, set forth in separate opinions in Desist v. United States, 394 U.S. 244 (1969), and Mackey v. United States, 401 U.S. 667 (1971)).

[28]See, e.g., Kentucky Revenue Cabinet v. CSC Oil Co., Inc., 851 S.W.2d 497, 499-502 (Ky. App. 1993) (applying Chevron Oil to deny refunds; purporting to distinguish the applicability of James B. Beam Distilling Co.); First of McAlester Corp. v. Oklahoma Tax Comm'n, 709 P.2d 1026, 1032-37 (Okla. 1985) (applying the "recent . . . vast body of case law" and the "particularly instructive" decision in Chevron Oil, to deny refunds); Salorio v. Glaser, 93 N.J. 447, 461 A.2d 1100, 1108-12, cert. denied, 464 U.S. 993 (1983) (applying the "modern view" concerning the invalidity of unconstitutional acts, including Chevron Oil, to deny refunds). The reluctance of states to let go of the Chevron Oil "escape hatch" was underscored by the need for this Court, in the remedy litigation triggered by Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989), to overturn the refusal of several states to give Davis retroactive effect -- notwithstanding the Court's decisions in Griffith and Beam. See, e.g., Sheehy v. Montana Dept. of Revenue, 250 Mont. 437, 820 P.2d 1257 (1991) (applying Chevron Oil), vacated, 509 U.S. 916 (1993); Duffy v. Wetzler, 174 A.D.2d 253, 579 N.Y.S.2d 684 (continued...)

case-by-case retrospectivity eliminated the threat to taxpayer rights, because states remain averse to returning to taxpayers the fruits of illegal tax collections -- even though, as this Court recognized 84 years ago, those monies are the taxpayer's and are not transformed into the property of the state by the mere act of collection when that act is done without proper authority. Atchison, Topeka & Santa Fe Ry., 223 U.S. at 287.

As this case shows, if deprived of the ability to "balance away" the obligation to make restitution, states will resort to the equally effective device of substituting a lesser remedy for the express purpose of evading their obligation to make restitution. Indeed, the Supreme Court of Washington denied Digital a refund, after ordering refunds for local taxpayers who paid an invalid municipal tax[29] -- a reflexive preference for local over interstate interests which was the concern of Justice Holmes, when he wrote:

---

[28](...continued)
(applying Chevron Oil), appeal dismissed, 79 N.Y.2d 976, 583 N.Y.S.2d 190, 592 N.E.2d 798 (1992), but judgment vacated, 509 U.S. 917 (1993); Harper v. Virginia Dept. of Taxation, 242 Va. 322, 410 S.E.2d 629 (1991), rev'd, 509 U.S. 86 (1993) (holding Davis must be given retroactive effect, and vacating refusals to do so based on Chevron Oil and related authority). This result should have come as no surprise, given the historic allergy of state courts to requiring the disgorgement of illegally exacted tax monies.

[29]See Covell v. City of Seattle, supra, 905 P.2d at 333. Although Digital believes the combination of the decision in Covell and this case raises serious concerns under the Privileges and Immunities Clause, Digital does not seek review of that issue. But the fact of the grant of refunds to local taxpayers in Covell, contemporaneous with the denial of refunds to an out-of-state taxpayer in this case, does shed an illuminating light on the local preferences that frequently animate state court decisions on these issues.

> I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end.

O.W. Holmes, Jr., Collected Legal Papers at 295-96 (New York: Harcourt Brace & Howe 1920). Here, the Washington Supreme Court's willingness to deprive an out-of-state taxpayer of restitution for illegally exacted taxation underscores how deprivation of a taxpayer's due process rights can also endanger Commerce Clause protections, because the court's action shows states will be able to employ the law of remedies to frustrate effective relief for facial discrimination against interstate commerce.[30]

This case provides the appropriate and needed vehicle for putting an end to such practices.

---

[30]This Commerce Clause element was not present in V-1 Oil Co. v. Idaho Petroleum Clean Water Trust Fund, 128 Idaho 890, 920 P.2d 909 (1996), which involved the refusal by the Supreme Court of Idaho to order a refund, following the court's decision upholding the validity of the collection of a state tax against a state constitutional challenge while finding that the state constitution required that the money collected had to be appropriated in a different manner. This Court denied the taxpayers' petition for a writ of certiorari. See order denying petition in Supreme Court Cause No. 96-513 (Dec. 2, 1996).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael B. King
(Counsel of Record)
George C. Mastrodonato
Kathleen D. Benedict
Lane Powell Spears Lubersky LLP
1420 Fifth Avenue, Suite 4100
Seattle, Washington 98101-2338
(206) 223-7000

Counsel for Petitioner

February 6, 1997

SUPREME COURT OF WASHINGTON

DIGITAL EQUIPMENT CORPORATION,
Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Respondent

No. 62414-3

Decided May 23, 1996

SMITH, J.—Digital Equipment Corporation seeks direct review by this court of a Thurston County Superior Court order on summary judgment dismissing Digital's action for refund of or credit for business and occupation (B&0) taxes paid to the State of Washington between January 1, 1983 and August 11, 1987. We granted review. We affirm only the dismissal.

QUESTIONS PRESENTED

The questions presented in this case are: (1) whether United States Supreme Court decisions rendered subsequent to this court's 1988 decision in National Can II[1] have undermined that holding, which denied retroactive application of the Supreme Court's 1987 ruling in Tyler Pipe Industries v. Department of Revenue,[2] a case which struck down as unconstitutional Washington's business and occupation (B&O) tax exemption scheme; and (2) whether the remedy of retroactively applying the

---

[1]109 Wn.2d 878, 749 P.2d 1286, cert. denied, 486 U.S. 1040 (1988).

[2]483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987).

1987 B&O tax credit legislation (RCW 82.04.440) meets the requirements of due process under the Fourteenth Amendment.[3]

STATEMENT OF FACTS

In 1984, a group of taxpayers filed suit for refunds of B&O taxes paid to the state of Washington. The taxpayers argued that the state's B&O tax exemption under RCW 82.04.440 violated the Commerce Clause of the United States constitution, article I, section 8, by providing to local manufacturers selling goods in this state a tax exemption not available to manufacturers who sold goods out of state. This court ultimately rejected that argument in the companion cases of Tyler Pipe Industries v. Department of Revenue and National Can Corporation v. Department of Revenue.[4]

In Tyler Pipe Industries v. Department of Revenue, the United States Supreme Court subsequently reversed both Tyler Pipe and National Can, holding that the tax exemption discriminated against interstate commerce in violation of the Commerce Clause.[5] The Court then remanded the case to this court for resolution of "remedial issues."[6] In National Can Corporation v. Department of Revenue (National Can II) we held that the Tyler Pipe decision operated only prospectively and thus

---

[3]Digital originally requested an award of attorney fees under 42 U.S.C. §§ 1983 and 1988, but later withdrew the request. See Appellant's Reply Br. at 25.

[4]See Tyler Pipe Indus. v. Department of Rev., 105 Wn.2d 318, 715 P.2d 123 (1986) and National Can Corp. v. Department of Rev., 105 Wn.2d 327, 732 P.2d 134 (1986).

[5]Tyler Pipe Indus. v. Department of Rev., 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987).

[6]Tyler Pipe, 483 U.S. at 253.

no claims could be made for taxes which were paid prior to the decision in that case.[7]

The Washington Legislature responded to the Supreme Court decision in Tyler Pipe by amending the B&O tax exemption statute on August 11, 1987. The amendment replaced the old multiple activities exemption with a two-way credit scheme. The amendment cured the constitutional defect identified by the Court in Tyler Pipe[8] by granting to businesses a credit for gross receipts taxes paid to this or any other state.[9] Although the new credit law expressly stated it was to "take effect immediately,"[10] the Legislature intended that the new law would operate retroactively in the event of a court-ordered remedy.[11] The Legislature also intended that these tax credits would be the exclusive remedy available for those entitled to relief.[12]

---

[7]National Can Corp. v. Department of Rev., 109 Wn.2d 878, 895, 749 P.2d 1286, cert. denied, 486 U.S. 1040 (1988).

[8]Although the constitutionality of the 1987 credit law is not at issue in this appeal, we have determined the new law meets constitutional requirements. See American Nat'l Can v. Department of Rev., 114 Wn.2d 236, 248-53, 787 P.2d 545 (holding that the 1987 amendment to the B&O tax credit law satisfies the requirements of the equal protection, due process and commerce clauses), cert. denied, 498 U.S. 880 (1990).

[9]Laws of 1987, 2d Ex. Sess., ch. 3, § 3; RCW 82.04.440.

[10]Laws of 1987, 2d Ex. Sess., ch. 3 § 5.

[11]See id. at § 3; see also American National Can, 114 Wn.2d at 250-53.

[12]Laws of 1987, 2d Ex. Sess., ch. 3, § 3 ("[R]elief [to] be limited to the granting of such credits"); American Nat'l Can, 114 Wn.2d at 253 ("[T]he 1987 credit law limits relief to the granting of credits.").

On August 27, 1987, Digital filed a complaint in the Thurston County Superior Court seeking refund of B&O taxes it paid between January 1, 1983 and July 31, 1987.[13] On December 29, 1988, Digital filed an amended complaint seeking an additional refund of taxes paid from June 23, 1987 through August 11, 1987, the interim period between the Tyler Pipe decision and the effective date of the 1987 legislation (the interim period).[14] The amended complaint also charged that the state's collection efforts of "said illegal taxes" were in violation of 42 U.S.C. § 1983, thus entitling Digital to attorney fees under 42 U.S.C. § 1988.[15]

On April 11, 1994, Digital moved for an order of partial summary judgment to grant its tax refund request for the period January 1, 1983 through August 11, 1987 and an award of attorney fees.[16] The state cross-motioned for summary judgment on April 18, 1994, arguing for outright dismissal of Digital's action.[17] By opinion letter dated September 9, 1994, Judge William Thomas McPhee granted partial summary judgment in favor of the state and dismissed Digital's refund claim as to all tax periods prior to June 23, 1987, but reserved ruling on taxes paid during the interim period pending further oral argument.[18] Digital then filed a motion for reconsideration on October 5, 1994.[19]

---

[13]See Clerk's Papers at 4-5.

[14]See id. at 11-12.

[15]See id. at 12 and n.3.

[16]See id. at 41-43.

[17]See id. at 70.

[18]See id. at 174-77.

[19]See id. at 178.

On November 18, 1994, Judge McPhee entered an order denying Digital's motion for reconsideration, granting the state's motion for summary judgment and dismissing Digital's refund claim in its entirety with prejudice.[20] In dismissing Digital's claim, the trial court relied primarily on this court's holding in National Can II that the Tyler Pipe decision was to operate only on a prospective basis.[21]

On December 16, 1994, Digital appealed direct to this court for review.[22] It argues that United States Supreme Court cases decided subsequent to National Can II have undermined this court's holding in that case, and those cases now require that Tyler Pipe be applied retroactively to tax periods predating its determination.[23] Digital also maintains that the 1987 tax credit law, RCW 82.04.440, does not provide it with meaningful redress for taxes it paid under the previous unconstitutional scheme, and hence violates its rights under the Due Process Clause of the Fourteenth Amendment.

DISCUSSION

RETROACTIVITY OF TYLER PIPE

This court was asked in National Can II to decide whether the United States Supreme Court's decision in Tyler Pipe, which declared Washington's B&O tax exemption scheme unconstitutional, must be applied retroactively or applied only prospectively. In deciding the issue, we relied primarily on the retroactivity test outlined by the Supreme Court in Chevron Oil v.

---

[20]See id. at 233-37.

[21]See id. at 174-77.

[22]See id. at 238-44.

[23]See, e.g., Br. of Appellant at 3-7.

Huson.[24] In that case, three factors were enumerated for consideration in determining whether an appellate decision applies prospectively or retroactively: (1) whether the decision establishes a new rule of law by overruling clear past precedent or deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) whether retroactive application would further or retard the purposes of the rule; and (3) whether retroactive application would be inequitable.[25] Employing the Chevron Oil criteria, we concluded that Tyler Pipe applied on a prospective basis only and did not render taxes collected prior to the date of its determination unconstitutional.[26]

However, as later observed by this court in Robinson v. Seattle,[27] the precedential weight to be accorded Chevron Oil has been called into question by recent United States Supreme Court decisions. In James B. Beam Distilling Co. v. Georgia, a taxpayer brought a refund suit against Georgia, claiming a state tax statute which favored alcohol products produced from local goods violated the Commerce Clause.[28] The lower courts agreed the statute was unconstitutional in light of the Supreme Court's decision in Bacchus Imports, Ltd. v. Dias striking down a similar Hawaii

---

[24]Chevron Oil v. Huson, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971).

[25]Chevron Oil, 404 U.S. at 106-07; National Can II, 109 Wn.2d at 881.

[26]See National Can II, 109 Wn.2d at 895.

[27]See Robinson v. City of Seattle, 119 Wn.2d 34, 830 P.2d 318 (1992).

[28]Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S. Ct. 2439, 2442, 115 L. Ed. 2d 481 (1991), cert. denied, 115 S. Ct. 662, 130 L. Ed. 2d 597 (1994).

statute,[29] but concluded the taxpayer was not entitled to a refund.[30] Using the test outlined in Chevron Oil, the Georgia Supreme Court held the Bacchus decision should not apply retroactively to facts antedating its pronouncement.[31]

The United States Supreme Court reversed without considering the Chevron Oil rationale. It held that because the decision in Bacchus applied the rule to the parties then before the Court, that rule should apply to all cases still pending.[32] The Court reasoned that it was error "to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so."[33] Although the Court in Bacchus had not explicitly addressed the question whether its holding should apply retroactively to facts predating its pronouncement, the Court in Beam concluded that retroactivity is assumed when the question of retroactivity is not reserved.[34] Writing for the majority, Justice Souter noted that "[b]ecause the Bacchus opinion did not reserve the question whether its holding should be applied to the parties before it, . . ., it is properly understood to have followed the normal rule of retroactive application in civil cases."[35]

---

[29]See Bacchus Imports v. Dias, 468 U.S. 263, 273, 104 S. Ct. 3049, 82 L. Ed. 2d 200 (1984) (the court struck down Hawaii tax statute favoring locally produced alcoholic beverages as a violation of the Commerce Clause).

[30]Beam, 111 S. Ct. at 2442.

[31]Id.

[32]Id. at 2445.

[33]Id. at 2446.

[34]Id. at 2445.

[35]Id.

In Harper v. Virginia Dep't of Taxation, the Supreme Court was confronted with a Virginia tax statute which exempted from state income taxes only those retirement pensions paid by either state or local governments.[36] The Court had previously decided in Davis v. Michigan Dep't of Treasury that a similar tax imposed by Michigan violated the constitutional doctrine of intergovernmental tax immunity because it treated federal employees differently from state employees.[37] After Davis, Virginia repealed the exemption statute.[38] Taxpayers sued the Virginia Department of Revenue seeking refund of taxes paid under the discriminatory scheme.[39]

The trial court denied the refunds on the basis that the Davis decision did not apply retroactively the Virginia Supreme Court affirmed.[40] Applying the Chevron Oil test, the court held that Davis did not operate retroactively and that pre-Davis tax assessments thus were not improper.[41] Reasoning that because the Court in Davis had not ruled on whether to apply its holding to the litigants in that case, the Virginia court concluded that it remained free to apply the Chevron Oil analysis.[42] The Supreme Court reversed. Reiterating Justice Souter's conclusion in Beam, the Court again noted that once a case announcing a rule of federal law has applied that rule to the litigants before the court, no court

---

[36]Harper v. Virginia Dept. of Taxation, ___ U.S. ___, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).

[37]Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 817, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989).

[38]Harper, 125 L. Ed. 2d at 82.

[39]Id.

[40]Id.

[41]Id. at 83.

[42]Id.

may "'refuse to apply [that] rule . . . retroactively'."[43] Citing Beam, the Court then articulated the following rule on retroactive application of a previous ruling:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and *must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.*

(Emphasis added.)[44]

The Court then stated that:

> When [it] does not "*reserve the question whether its holding should be applied to the parties before it,*" . . . an opinion announcing a rule of federal law "is properly understood to have followed the *normal rule of retroactive application*" and must be "read to hold . . . that its rule should apply retroactively to the litigants then before [it]." Furthermore, the legal imperative "to apply a rule of federal law retroactively after the case announcing the rule has already done so" must "prevai[l] *over any claim based on a Chevron Oil analysis.*"

(Emphasis added.)[45]

---

[43]Id. at 86 (quoting Beam, 111 S. Ct. at 2451.)

[44]Id.

[45]Id. at 86-87 (quoting Beam 111 S. Ct. at 2445.)

Relying on this new "express reservation test," the Court rejected the state court's reasoning that the issue of retroactivity had not been addressed in Davis.[46] It pointed out that in Davis the question of retroactivity had not been reserved by the Court; and since remedial issues had been considered, it had necessarily applied the rule announced in Davis to the litigants before it.[47] That being the case, the Court applied the Davis rule retroactively to the tax years at issue in the Harper taxpayers' refund action.[48] The Court is thus considered to have applied a decision to the parties before it when it has not reserved the question whether its holding should be retroactively applied.[49]

When the Supreme Court remands a case exclusively for resolution of remedial issues, it has not reserved the question of retroactive application of that case.[50] Once it has applied a decision to the litigants in one case, it must do so with respect to all others not barred by res judicata or procedural requirements,[51] regardless of any conclusion derived from application of Chevron Oil principles.[52] The normal rule, then, is retroactive application

---

[46]Id. at 87.

[47]Id.

[48]Id. at 88.

[49]Harper, 125 L. Ed. 2d at 86-87; Beam, 111 S. Ct. at 2445; Robinson, 119 Wn.2d at 76.

[50]Harper, 125 L. Ed. 2d at 87; Beam, 111 S. Ct. at 2445.

[51]See Beam, 111 S. Ct. at 2446 ("[R]etroactivity in civil cases must be limited by the need for finality, . . .; once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed.").

[52]Id. at 2447; Robinson, at 75 (quoting Beam).

of a new pronouncement of federal law unless the Court declares otherwise.[53] Chevron Oil no longer controls in this area.[54]

To the extent our decision in National Can II holds that Tyler Pipe applies only on a prospective basis, we overrule it. The rule derived from Beam and Harper is clear: when the United States Supreme Court remands a case, unless it *explicitly* reserves the issue of retroactive application of that case,[55] the normal rule of retroactivity is assumed. In Tyler Pipe, the Court remanded only on the issue of remedies, and did not reserve the question of retroactive application of its holding in the case.[56] Therefore, it follows that the benefit of the Tyler Pipe holding properly might extend to Digital, inasmuch as it would not be barred by either procedural requirements or by res judicata.

---

[53]See Beam, 111 S. Ct. at 2443 (noting that the practice of retroactive application is overwhelmingly the norm); Robinson, 119 Wn.2d at 79 (same) (quoting Beam).

[54]See Miller v. Santa Cruz Cy., 39 F.3d 1030, 1035 (9th Cir. 1994) (holding that Harper, not Chevron Oil, is now the controlling rule) cert. denied, 115 S. Ct. 2613, 132 L. Ed. 2d 856 (1995). United States v. 20832 Big Rock Drive, 51 F.3d 1402, 1405-06 (9th Cir. 1995) (same).

[55]The Court in Beam cited American Trucking Ass'n, Inc. v. Scheiner, 483 U.S. 266, 97 L. Ed. 2d 266, 107 S. Ct. 2829 (1987) as an example of reserving the issue of retroactivity to a state court. Beam, 111 S. Ct. at 2445. In American Trucking, the Court remanded a case to the Pennsylvania Supreme Court for consideration of whether the Court's ruling on constitutionality "should be applied retroactively and to decide other remedial issues." American Trucking, 483 U.S. 297-98.

[56]See Tyler Pipe, 483 U.S. at 253; see also American Nat'l Can, 114 Wn.2d at 240.

THE 1987 TAX CREDIT LAW

With retroactive application of the Tyler Pipe decision, Digital conceivably might be entitled to some type of relief. However, as Digital readily concedes, retroactive application of Tyler Pipe does not necessarily entitle it to a refund.[57] Our determination that Digital might be entitled to some form of relief in light of Tyler Pipe brings the 1987 credit law into operation.[58] But Digital argues the 1987 credit law, as an exclusive remedy, does not meet the requirements of federal due process.[59]

A declaration by the United States Supreme Court that a tax scheme is unconstitutional does not, as a matter of federal law, require refund of taxes illegally collected.[60] Rather, "a State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination."[61] To provide relief consistent with federal due process principles, however, a state may choose to provide a predeprivation remedy, such as "a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing."[62] "On the other hand, if no such predeprivation remedy exists, 'the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief

---

[57]See, e.g., Appellant's Reply Br. at 16.

[58]American Nat'l Can, 114 Wn.2d at 251.

[59]See, e.g., Appellant's Br. at 26-33.

[60]Harper, 125 L. Ed. 2d at 88.

[61]Id. at 88-89 (quoting McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 39-40, 110 L. Ed. 2d 17, 110 S. Ct. 2238 (1990)).

[62]Id. at 89 (quoting McKesson, 496 U.S. at 38).

to rectify any unconstitutional deprivation.'"[63] Such relief may take the form of refunds, or "some other order that 'create[s] in hindsight a nondiscriminatory scheme.'"[64]

The issue in this case, then, becomes whether retroactive application of the 1987 credit law, a postdeprivation remedy, satisfies due process as "meaningful backward-looking relief" that "create[s] in hindsight a nondiscriminatory scheme" which will "rectify any unconstitutional deprivation" suffered by Digital. To pass this test, the credit law must treat Digital and those manufacturers who benefited under the prior discriminatory scheme "in a manner consistent with the dictates of the Commerce Clause."[65] It must also provide Digital with both "an opportunity to contest the validity of the tax and a 'clear and certain remedy' designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property."[66]

Retroactive application of the credit law satisfies the requirements of federal due process. Under the former discriminatory tax scheme, some out-of-state manufacturers paid a wholesaling or retailing B&O tax on Washington sales and also paid manufacturing B&O taxes owed to another state. In-state manufacturers, however, were exempted from the manufacturing tax on any in-state sales subject to the wholesaling or retailing tax. The 1987 credit law remedies this problem by granting a tax credit to any manufacturer paying a gross receipts tax to the state of Washington or any other state. Retroactive application of the law equalizes the tax disparity between benefited and disadvantaged manufacturers by granting tax credits only to the latter. By retroactively granting credits only to manufacturers who suffered

---

[63]Id. (quoting McKesson, 496 U.S. at 31).

[64]Id. (quoting McKesson, 496 U.S. at 40).

[65]McKesson, 496 U.S. at 40.

[66]Id.

under the discriminatory law, the state has created "in hindsight a non-discriminatory scheme."[67]

Digital argues that under McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, the Supreme Court outlined the only three options available to states when attempting to provide meaningful backward looking relief: "(1) a full refund of the unconstitutional taxes collected, (2) a retroactive tax on the taxpayers exempted from the tax, or (3) a combination of the two remedies."[68] But nothing in the McKesson opinion suggests the Court intended this enumeration of options to be exclusive. Nor is there any indication that the list of suggested remedies was meant to apply beyond the specific issue confronting the Court in that case: whether the requirements of federal due process were met when Florida provided only prospective relief to taxpayers who had been taxed under an unconstitutional scheme. Digital's interpretation of McKesson also conflicts with the general rule recognized by the Court that the states retain flexibility in crafting a remedy for the unconstitutional collection of taxes.[69]

---

[67]Digital argues that "retroactive application of the 1987 credit law will do nothing to change the fact that Digital paid the unconstitutional B&O tax while its competitors did not." Appellant's Reply Br. at 17. Digital also complains that it must apply for credits to equalize the tax disparity between it and manufacturers benefited under the unconstitutional exemption, while no such requirement is placed on the benefited manufacturers. Id. at 17 n.9. But Digital does not explain how either of these two facts leads to the conclusion that retroactive application of the 1987 credit law violates its rights under the Due Process Clause.

[68]Appellant's Br. at 30 (citing McKesson, 496 U.S. at 40-41).

[69]See, e.g., McKesson, 496 U.S. at 39-40 ("a [s]tate found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination"); Associated Indus. v. Lohman, ___ U.S. ___, 114 S. Ct. 1815, 1825, 128 L. Ed. 2d

(continued...)

The tax credit law, RCW 82.04.440, provides in part:

> **Persons taxable on multiple activities—Credits.** (1) Every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in.
>
> . . . .
>
> (4) Persons taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) or RCW 82.04.260 with respect to extracting or manufacturing products in this state shall be allowed a credit against those taxes for any (i) gross receipts taxes paid to another state with respect to the sales of the products so extracted or manufactured in this state, (ii) manufacturing taxes paid with respect to the manufacturing of products using ingredients so extracted in this state, or (iii) manufacturing taxes paid with respect to manufacturing activities completed in another state for products so manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the extraction or manufacturing of those products.

Subsection (5) defines "gross receipts tax" to include one which is "not, pursuant to law or custom, separately

---

[69](...continued)
639 (1994) (same); Harper, 125 L. Ed. 2d at 89 (noting that in crafting an appropriate remedy, a state is free to choose which form of relief it will provide, so long as it satisfies the minimum federal requirements of due process).

stated from the sales price" and "manufacturing tax" as "a gross receipts tax imposed on the act or privilege of engaging in business as a manufacturer. . . ."

Our consideration of the principal issues in this case became acutely academic when counsel for Digital during oral argument conceded that Digital had not been "double taxed" and consequently suffered no injury under the former unconstitutional tax scheme.[70] One of the justices asked "*In your particular situation, did your client actually pay out-of-state gross receipts taxes on its manufacturing operations?*" Counsel for Digital then replied "*We were not actually double taxed.*" This was further reinforced by the April 6, 1994 declaration of R.S. Kuraski, manager of federal and state income tax audits for Digital, in support of Digital's motion for partial summary judgment that:

> *Digital did not pay any qualifying extracting or manufacturing gross receipts taxes to any other jurisdictions outside Washington, including other state or local governments, the District Columbia or foreign countries, on any of the products which were manufactured outside the state of Washington and sold to Washington customers during the time periods [January 1, 1983 through June 23, 1987].*[71]

This is consistent with the assertion of Respondent State in its brief that Digital suffered no injury and is thus entitled to no relief.[72] We also conclude that in this case Digital is entitled to no relief either by tax credits or direct refunds under RCW 82.04.440.

---

[70]See RCW 82.04.440(4).

[71]Clerk's Papers at 48 (emphasis added).

[72]See Resp's Br. at 12.

We therefore affirm the Thurston County Superior Court in dismissing on summary judgment Digital's action for refund of or credit for business and occupation (B&O) taxes paid to the State of Washington.

Applying the 1987 credit law to Digital's claim for relief requires consideration of two tax periods. Because the law clearly applies to the interim period of June 23, 1987 and August 11, 1987,[73] Digital conceivably would have been eligible for credits for taxes paid during that period. However, the State correctly asserts that Digital is not entitled to credits for the interim period because it paid no gross receipts taxes, a requirement under the law.[74]

As to the tax period prior to June 23, 1987, the date of the Tyler Pipe decision, Digital conceivably would have been entitled to credits for this period as well. While in American National Can we addressed only the issue of retroactive application of the 1987 credit law to the interim period, section 3 of the 1987 session laws applies the law to tax periods prior to June 23, 1987.[75] In this instance as well, Digital is not entitled to tax credits because it paid no gross receipts taxes.

SUMMARY AND CONCLUSIONS

Once the United States Supreme Court has applied a new pronouncement of federal law to the parties then before the Court, it does so with respect to all others not barred by res judicata or procedural rules. The Court is considered to have applied a decision to the parties before it when it has not explicitly reserved

---

[73]See American Nat'l Can, 114 Wn.2d at 240-51 (holding that the 1987 credit law applies to the interim period of June 23, 1987 to August 11, 1987).

[74]See Resp't's Br. at 12.

[75]Laws of 1987, 2d Ex. Sess., ch. 3, § 3; RCW 82.04.440 (historical and statutory notes).

the question whether its holding should be applied retroactively. When the Court remands a case exclusively for resolution of remedial issues, it has not reserved the question of retroactive application of that case.

In the Tyler Pipe decision, in which the Supreme Court declared Washington's B&O tax exemption scheme unconstitutional, the Court did not reserve the question of retroactivity, but instead remanded only for resolution of remedial issues. Tyler Pipe must be applied retroactively to tax periods predating its pronouncement, thus rendering taxes collected under the invalid exemption law unconstitutional. To the extent that our decision in National Can II conflicts with this interpretation of federal retroactivity law, we overrule it.

To provide a postdeprivation remedy for unconstitutionally collected taxes consistent with the principles of federal due process under the Fourteenth Amendment, a remedy must provide meaningful backward-looking relief. It must also create in hindsight a nondiscriminatory scheme which rectifies the unconstitutional deprivation.

Retroactive application of the 1987 credit law, designed to cure the constitutional infirmities of the B&O tax exemption scheme, satisfies the requirements of federal due process as a postdeprivation remedy. By providing manufacturers with tax credits for unconstitutional taxes paid, a clear and certain remedy is provided which cures the unconstitutional deprivation by equalizing the tax disparity between those manufacturers and manufacturers who were not subjected to the unconstitutional B&O taxes.

We affirm the Thurston County Superior Court only in its dismissal on summary judgment of the claim by Appellant Digital Equipment Corporation for refund of or credit under RCW 82.04.440 for business and occupation (B&0) taxes paid to the

state of Washington between January 1, 1983 and August 11, 1987.

/s/ Charles Z. Smith
CHARLES Z. SMITH
Justice

/s/ James M. Dolliver
JAMES M. DOLLIVER
Justice

/s/ Charles W. Johnson
CHARLES W. JOHNSON
Justice

DURHAM, C.J. (concurring)—Digital Equipment Corporation (Digital) seeks a refund of wholesale taxes on products which it manufactured outside Washington but sold in this state before August 11, 1987. Digital contends the Supreme Court's decision in Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987), should be applied retroactively, and that only a refund will provide Digital with a remedy which satisfies due process. Although I agree with the majority that Digital is not entitled to any relief, I disagree with the majority's reasoning and with some of the assumptions made by the parties and our prior cases.

Digital contends recent Supreme Court authority calls into question our determination in National Can Corp. v. Department of Revenue, 109 Wn.2d 878, 889, 749 P.2d 1286, cert. denied, 486 U.S. 1040 (1988) (National Can II), that Tyler Pipe would apply only prospectively. I concur in the majority's determination to overrule that holding.[1] However, we should not casually

---

[1]Under James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S. Ct. 2439, 2446, 115 L. Ed. 2d 481 (1991), full retroactive application of a new rule of law is the norm, and it is error for a court to refuse to retroactively apply a rule of law after the case announcing the rule has already done so. The majority and the dissent assume that the issue is, therefore, whether the Supreme Court applied Tyler Pipe to the parties before it. The majority finds that Tyler Pipe did not reserve the issue of retroactivity and therefore applies retroactively. The dissent suggests that the Supreme Court left the issue of retroactivity to this court.

The proper formulation of the retroactivity issue here, however, is whether this court, in National Can II, should have retroactively applied Armco Inc. v. Hardesty, 467 U.S. 638, 104 S. Ct. 2620, 81 L. Ed. 2d 540 (1984) (the case which invalidated a similar West Virginia tax scheme). See Tyler Pipe, 483 U.S. at 251-52. Notwithstanding our efforts in National Can Corp. v.

(continued...)

assume that an out-of-state manufacturer like Digital has a valid discrimination claim under the old multiple activities exemption (MAE) or that the 1987 two-way credit scheme is the appropriate remedy for such discrimination. A review of the history of constitutional challenges to the MAE is necessary to properly evaluate Digital's claims.

The multiple activities exemption before Tyler Pipe:

Washington's business and occupation (B&O) tax system taxes both manufacturing and wholesaling. Since 1950, double tax liability for the same goods was limited by the MAE, which provided an exemption from the manufacturing tax for products which were also subject to the Washington wholesale tax. RCW 82.04.440 (1981). The effect of the MAE was such that only products which were sold outside of Washington were subject to the Washington manufacturing tax. Until the mid-1980's, this system was repeatedly but unsuccessfully challenged on the theory that it discriminated against interstate commerce. Tyler Pipe, 483 U.S. at 237 (citing General Motors Corp. v. Washington, 377 U.S. 436, 84 S. Ct. 1564, 12 L. Ed. 2d 430 (1964)).

In 1984, the Supreme Court invalidated a West Virginia tax scheme which was similar to Washington's B&O tax. Armco Inc. v. Hardesty, 467 U.S. 638, 104 S. Ct. 2620, 81 L. Ed. 2d 540 (1984). West Virginia imposed a 0.27 percent wholesale tax

---

[1](...continued)
Department of Revenue, 105 Wn. 2d 327, 732 P.2d 134 (1986) (National Can I) to distinguish Armco, that case in fact required the partial invalidation of the Washington business and occupation (B&O) tax scheme. The relevant rule of law was Armco, not Tyler Pipe.

Armco did not reserve the issue of retroactivity and can, therefore, be understood to apply retroactively. Because the Supreme Court applied Armco retroactively, it was error, under Beam, for this court to not follow suit in National Can II.

on goods sold in the state. Local manufacturers were exempt from the wholesale tax but paid a 0.88 percent tax on goods manufactured in the state. The Supreme Court found that this scheme discriminated against interstate commerce.

> The tax provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it. Thus, if the property was manufactured in the State, no tax on the sale is imposed. If the property was manufactured out of the State and imported for sale, a tax of 0.27% is imposed on the sale price.

Armco, 467 U.S. at 642. The fact that local manufacturers paid a higher tax rate on the manufacturing tax did not cure the discriminatory application of the wholesale tax. If the state where the goods were made also imposed a manufacturing tax, the out-of-state manufacturers would pay both a manufacturing and a wholesale tax while the local manufacturers would pay only a manufacturing tax. Armco, 467 U.S. at 642-44.

The "internal consistency" test:

Rejecting the suggestion that the out-of-state manufacturers were required to prove a discriminatory impact, the Armco Court extended its application of the "internal consistency" test to claims of discrimination. "[A] tax must have 'what might be called internal consistency -- that is the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade." Armco, 467 U.S. at 644 (citing Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169, 103 S. Ct. 2933, 77 L. Ed. 2d 545 (1983)). The West Virginia tax system was not internally consistent because liability for the wholesale tax was dependent upon where the goods were manufactured.

The 1985 one-way credit scheme:

Following Armco, numerous firms sought relief from Washington B&O taxes that they had already paid on grounds that the MAE discriminated against interstate commerce. In anticipation of the possible invalidation of the MAE under Armco, the 1985 Legislature amended the MAE to provide a credit against the manufacturing tax for wholesale taxes paid to another state. Final Legislative Report, 49th Sess., SSB 3678, at 303-04 (1985). This one-way credit scheme was to apply (1) only if a court found that the existing MAE discriminated against interstate commerce, and (2) only to tax reporting periods for which relief was found to be appropriate. Laws of 1985, ch. 190, § 1; RCW 82.04.440(4) (1985).

The modified MAE created a B&O tax system that satisfies the internal consistency test. That is, if every jurisdiction taxed both wholesale activity and manufacturing but also provided a credit against the manufacturing tax for wholesale taxes paid to any state, then every state would collect a wholesale tax and all manufacturers would be exempt from manufacturing taxes. The resulting tax burden would not depend upon whether the taxed goods were sold locally or across state lines. Consequently, the MAE, as modified by the 1985 one-way credit scheme, does not discriminate against interstate commerce.

Tyler Pipe:

Following Armco, numerous taxpayers demanded relief from their B&O tax liability. We initially rejected the argument that the MAE was discriminatory. National Can Corp. v. Department of Revenue, 105 Wn.2d 327, 732 P.2d 134 (1986) (National Can I). Taxpayers appealed. The Supreme Court held that the MAE, as it existed before the 1985 amendments, was invalid "because it places a tax burden upon manufacturers in Washington engaged in interstate commerce from which local manufacturers selling locally are exempt." Tyler Pipe, 483 U.S. at 253. Tyler Pipe left this court to decide the necessary remedial issues on remand. Id.

Consistent with its limited holding, Tyler Pipe did not analyze the 1985 one-way credit scheme remedy. The opinion nevertheless indicates that the 1985 Legislature's understanding of the necessary remedy was correct. In defense of the existing MAE, the State argued that the manufacturing tax was similar to a use tax which the Supreme Court had previously upheld. The use tax exempted goods on which sales tax had already been paid in any state, not just in Washington. Tyler Pipe, 483 U.S. at 245 (citing Henneford v. Silas Mason Co., 300 U.S. 577, 57 S. Ct. 524, 81 L. Ed. 814 (1937)). Observing the significant distinction between the use tax and the Washington manufacturing tax, the Supreme Court rejected the State's argument.

> The parallel condition precedent for a valid multiple activities exemption eliminating exposure to the burden of a multiple tax on manufacturing and wholesaling would provide a credit against Washington tax liability for wholesale taxes paid by local manufacturers to any State, not just Washington.

Tyler Pipe, 483 U.S. at 246 (emphasis added). The credit against Washington manufacturing taxes for wholesale taxes paid to any state created a nondiscriminatory scheme which was constitutional under Silas Mason Co. This part of the Tyler Pipe opinion confirms the determination that the 1985 one-way credit scheme cured the discriminatory effect of the old MAE.

Remedies under Tyler Pipe:

Although the Supreme Court limited its holding to a determination that the old MAE discriminated against Washington manufacturers who sold their products outside the state, and expressly reserved all remedial issues for consideration by this court on remand, the Tyler Pipe opinion nevertheless speculated about possible remedies.

> Compliance with our holding on the discrimination issue, however, would not necessarily preclude the

> continued assessment of a wholesaling tax. Either a repeal of the manufacturing tax or an expansion of the multiple activities exemption to provide out-of-state manufacturers with a credit for manufacturing taxes paid to other States would presumably cure the discrimination.

Tyler Pipe, 483 U.S. at 248-49 (emphasis added). It is difficult to discern what the Court meant by this comment. The suggestion that a credit for out-of-state manufacturing taxes is needed to cure the MAE flatly contradicts the passage quoted earlier which indicates that only a credit for out-of-state wholesale taxes is required.

Tyler Pipe never actually explained how the Washington wholesale tax discriminates against interstate commerce. Since 1950, the wholesale tax has been uniformly applied to both in-state and out-of-state manufacturers. That tax was levied on Washington sales without regard to where the goods were manufactured and therefore did not discriminate against interstate commerce. We had previously held that out-of-state manufacturers who pay only Washington wholesale taxes cannot complain of the discriminatory effect of the MAE. B.F. Goodrich Co. v. State, 38 Wn.2d 663, 668, 231 P.2d 325, cert. denied, 342 U.S. 876 (1951).[2]

Furthermore, the application of the Supreme Court's suggestion creates a tax scheme which violates the internal consistency test. Under such a system, Washington would tax both wholesaling and manufacturing but would provide (1) a credit against the manufacturing tax for wholesale taxes paid in Washington (the MAE) and (2) a credit against the wholesale tax for "manufacturing taxes paid to other States" (the suggestion above). If every state adopted such a system, locally manufactured goods sold in-state would be subject to only the wholesale tax. In

---

[2]Tyler Pipe discussed, but did not overrule, this case. 483 U.S. at 236 n.7, 9.

contrast, goods sold in interstate commerce would be subject to only the manufacturing tax in the state where they were made.

Fortunately, the Supreme Court's reservation of all remedial issues for resolution by this court made this erroneous suggestion dicta. See National Can II, 109 Wn.2d at 889. We have never actually held that out-of-state manufacturers are entitled to relief under Tyler Pipe or that a credit for out-of-state manufacturing taxes is necessary. Our consideration of these issues was quickly overtaken by events.

The 1987 two-way credit scheme:

Less than a month after the Supreme Court's Tyler Pipe decision, the 1987 Legislature further modified the MAE. Based on the unfortunate reference to a credit for out-of-state manufacturers, the Legislature concluded that "[l]anguage in the [Tyler Pipe] decision suggests the one-way credit may not be a sufficient remedy." Final Legislative Report, 50th Sess., SB 6078, at 115 (1987). This language convinced the 1987 Legislature that it was required to further amend the MAE. See American Nat'l Can Corp. v. Department of Revenue, 114 Wn.2d 236, 787 P.2d 545, cert. denied, 498 U.S. 880 (1990) (National Can III). The Legislature quickly passed new amendments to the MAE which provided a credit against wholesale taxes for manufacturing taxes paid to any state.[3] Laws of 1987, 2d Ex. Sess., ch. 3, § 2; RCW 82.04.440(2) (1987).

This two-way credit scheme applies prospectively from the effective date of the amendment, August 11, 1987. Like the 1985 one-way credit scheme, it applies retroactively only to the extent that a court has determined that a taxpayer is entitled to relief from the existing MAE. Laws of 1987, 2d Ex. Sess., ch. 3, § 3; RCW

---

[3]Tyler Pipe suggested a credit for out-of-state manufacturing taxes. 483 U.S. at 249. The two-way credit scheme appears to provide a credit for all manufacturing taxes, including those paid in Washington. RCW 82.04.440(2), (5)(c) (1987).

82.04.440 (1987). On remand from Tyler Pipe, we did not consider the effect of either the 1985 or 1987 amendments to the MAE because we held that Tyler Pipe only applied prospectively. National Can II, 109 Wn.2d at 749.[4]

The present case:

Tyler Pipe held that the MAE discriminated against Washington manufacturers who sold their products outside the state. 483 U.S. at 253. Our determination in B.F. Goodrich Co. that out-of-state manufacturers cannot complain of the discriminatory effect of the MAE has not been reversed.[5] Nevertheless, Digital asserts that it is entitled to a refund for the wholesale taxes it has already paid. We can easily dispose of that claim on its merits.[6]

---

[4]The new B&O tax system was challenged again in American Nat'l Can Corp. v. Department of Revenue, 114 Wn.2d 236, 787 P.2d 545 (1990), cert. denied, 498 U.S. 880 (1990) (National Can III). In that case, we upheld the prospective application of the 1987 two-way credit scheme against new discrimination claims. We reversed the trial court's determination that taxpayers were entitled to a refund for B&O taxes paid during the "interim period" between the decision in Tyler Pipe (June 23, 1987) and the effective date of the 1987 amendments (August 11, 1987). Both holdings were based on the parties' concessions and assumptions that the 1987 two-way credit scheme remedied the discrimination identified in Tyler Pipe. National Can III, 114 Wn.2d at 242, 244, 249, 250. We also accepted the State's concession that taxpayers were entitled to the two-way credit remedy during the interim period. National Can III, 114 Wn.2d at 249.

[5]See n.2 infra.

[6]The majority suggests that this case became academic after it was determined that Digital had not been double taxed, i.e., paid any out-of-state manufacturing taxes in addition to its Washington wholesale taxes on the same goods. Majority at 18-19. This

(continued...)

Assuming, arguendo, that Digital has a valid discrimination

---

[6](...continued)
observation implies that such double taxation is a necessary or sufficient element of a discrimination claim. Neither is the case.

The application of two states' differing tax schemes may expose interstate commerce to double taxation without discriminating against such commerce.

> It is true, as the State of Washington appearing as amicus curiae points out, that Armco would be faced with the same situation that it complains of here if Ohio (or some other State) imposed a tax only upon manufacturing, while West Virginia imposed a tax only upon wholesaling. In that situation, Armco would bear two taxes, while West Virginia sellers would bear only one. But such a result would not arise from impermissible discrimination against interstate commerce but from fair encouragement of in-state business.

Armco Inc., 467 U.S. at 645.

Conversely, a tax scheme which does not result in double tax liability may be discriminatory. Relief from the West Virginia wholesale tax did not require the out-of-state manufacturers to establish that they actually paid any out-of-state manufacturing taxes. Armco Inc., 467 U.S. at 644. Likewise, Washington manufacturers who sell their products outside this state need not show that they actually paid any out-of-state wholesale taxes. The remedy in such cases may be limited to an expansion of the tax exemption to provide a credit for similar out-of-state taxes (which may not benefit taxpayers who were not double taxed). But until some remedy is provided and the tax scheme is rendered non-discriminatory as applied, the absence of double taxation does not establish that a taxpayer has not suffered discrimination.

claim, the first issue is whether retroactive application of Tyler Pipe in turn triggers the retroactive application of the 1987 two-way credit scheme. The unfortunate dicta in Tyler Pipe has given rise to an almost universal assumption that the 1987 two-way credit scheme is necessary to cure the discrimination created by the old MAE.[7] A careful analysis reveals that this assumption is incorrect.

By its own terms, the 1987 scheme applies retroactively only if the MAE "as it existed before August 11, 1987" is invalidated by a court. Laws of 1987, 2d Ex. Sess., ch. 3, § 3; RCW 82.04.440 (1987). The MAE "as it existed before August 11, 1987" includes the potential retroactive application of the one-way credit scheme created by the 1985 amendments to RCW 82.04.440. As noted earlier, Tyler Pipe invalidated the oldest version of the MAE, not the version of the MAE which included the 1985 one-way credit scheme. See Tyler Pipe, 483 U.S. at 237 n.8.

The retroactive application of Tyler Pipe's invalidation of the pre-1985 MAE triggers the retroactive application of the 1985 one-way credit scheme. RCW 82.04.440(4)(a) (1985). The question then becomes whether that version of the MAE is constitutional. As the 1985 Legislature anticipated, that version of the MAE does not discriminate against interstate commerce. Tyler Pipe does not hold otherwise. In the absence of any final court decision holding that the 1985 one-way credit scheme is discriminatory, the retroactive application of the 1987 scheme is not triggered. Consequently, the 1985 one-way credit scheme applies retroactively to all tax periods before August 11, 1987.[8]

---

[7]Relying on National Can III, the majority assumes that the retroactive invalidation of the MAE brings the 1987 two-way credit scheme into operation. Majority at 14.

[8]The assumption in National Can III that the 1987 scheme applies to the interim period appears to be incorrect. However,

(continued...)

Due Process:

The determination that the MAE, as amended by the 1985 one-way credit scheme, does not discriminate against interstate commerce is not the end of the inquiry. Digital was still taxed under the old version of the B&O tax system. Therefore, we must determine whether the retroactive application of the 1985 one-way credit scheme is a constitutionally adequate remedy as applied to Digital. Although Digital challenges the 1987 scheme, the issue is actually whether the 1985 one-way credit scheme satisfies due process.

Due process requires that a state provide a "clear and certain remedy" from the burden of unconstitutional taxes. McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Dep't of Business Regulation, 496 U.S. 18, 39, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990) (citing Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor, 223 U.S. 280, 32 S. Ct. 216, 56 L. Ed. 436 (1912)). Where a tax is unconstitutional in its entirety, such as where the tax is beyond the state's power to impose, a state may have no alternative but to refund the unlawfully collected taxes. However, where a tax is unconstitutional only to the extent that it discriminates against interstate commerce, the state enjoys flexibility in curing the defect. McKesson, 496 U.S. at 39-40.

> [T]he State's duty under the Due Process Clause to provide a 'clear and certain remedy' requires it to ensure that the tax as actually imposed on petitioner and its competitors during the contested tax period does not deprive petitioner of tax moneys in a manner that discriminates against interstate commerce.

---

[8](...continued)
that assumption was based on the State's concession that it applied. See n.4 infra. The State makes the same concession here. Br. of Resp't at 10.

McKesson, 496 U.S. at 43.

The retroactive application of the 1985 one-way tax credit scheme creates a non-discriminatory B&O tax scheme. The wholesale tax credit against manufacturing taxes is available without regard to whether the goods are sold locally or out of state. The wholesale tax is levied on all goods sold in Washington without regard to where they were manufactured. Although some Washington manufacturers may be entitled to relief under the one-way credit scheme, the wholesale taxes actually imposed on out-of-state manufacturers, like Digital, are nondiscriminatory as applied. As a result, Digital is not entitled to any relief from those taxes.

Conclusion:

I would hold that (1) Tyler Pipe applies retroactively, (2) the 1985 one-way credit scheme applies to all tax periods before August 11, 1987, and (3) this remedy satisfies due process. I would disapprove the incorrect assumptions made in National Can II and National Can III to the extent that they are inconsistent with this analysis.

/s/ Barbara Durham
BARBARA DURHAM
Chief Justice

/s/ Gerry L. Alexander
GERRY L. ALEXANDER
Justice

GUY, J. (dissenting)—I dissent on the retroactivity issue. The line of federal cases announcing the new rule of law on retroactivity does not apply to reopen Tyler Pipe Indus., Inc. v. Department of Revenue, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987), for two reasons. First, a new rule of federal law does not apply to cases that are already closed when the rule is announced. Second, the nature of the remand from the Supreme Court in Tyler Pipe does not give rise to application of the new rule of automatic retroactivity announced in James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991).

The majority opinion effectively reopens a case which was final and closed almost a decade ago. The issue of the retroactivity of the Tyler Pipe decision was decided by this court in National Can Corp. v. Department of Revenue, 109 Wn.2d 878, 749 P.2d 1286, cert. denied, 486 U.S. 1040 (1988), under the then existing law. The parties to that case sought review in the United States Supreme Court and that review was denied. The law is settled on the issue; the decision of Tyler Pipe is given prospective only application. If the United States Supreme Court were deciding the Tyler Pipe case today, it probably would apply its new rule of commerce clause law to the litigants before it and thereby mandate retroactive effect be given its decision. If this court were deciding National Can today and if the Supreme Court had applied the new rule to the litigants, we would give the new rule of law retroactive effect. However, those cases are not being decided today; they were final eight years ago. Tyler Pipe and the remand to this court, National Can, were decided in 1987 and 1988, respectively, and the law in effect at that time was applied by the Supreme Court and by this court and that case is closed. The majority opinion reopens that case, which is in direct conflict with law announced by the Supreme Court.

The new rule on retroactivity announced in Beam Distilling in 1991 does not apply to the present case because the present litigants are asking us to reach back in time and apply a new rule of federal law to a case which was decided before the new rule of law was announced. The Supreme Court has clearly explained that

new legal principles, even when applied retroactively, do not apply to cases already closed. Reynoldsville Casket Co. v. Hyde, ___ U.S. ___, 115 S. Ct. 1745, 1751, 131 L. Ed. 2d 820 (1995).[1] The Tyler Pipe case has been closed since 1988 when the Supreme Court denied review of our decision in National Can. Therefore, the new federal rule on retroactivity announced in 1991 in Beam Distilling does not apply to the National Can decision.

It is illogical that the Supreme Court would remand to this court to allow us to decide how to apply its holding, deny certiorari on our decision applying the decision prospectively, and now mandate the case be applied in a contrary fashion to parties not even before the court in that controversy. I think the majority misreads the decision in Tyler Pipe when it finds the Supreme Court in that case did not leave open the issue of retroactivity, and it ignores the rule that new legal principles do not apply to cases already closed. A history of the cases and facts involved shows that the Supreme Court did allow this court to make the retroactivity decision after its holding in Tyler Pipe, and that its newer rules of retroactivity do not apply under the facts of this case.

In 1987, the United States Supreme Court declared unconstitutional a part of Washington state's B&O tax law and remanded to this court to decide if the decision should be applied retroactively or prospectively. The Supreme Court cited us to Chevron Oil,[2] indicating that it contained the "factors to consider in deciding whether to impose [the] decision prospectively only."[3]

---

[1]See also Beam Distilling, 501 U.S. at 541 (retroactivity in civil cases must be limited by the need for finality and a new rule "cannot reopen the door already closed.")

[2]Chevron Oil v. Huson, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971).

[3]The Supreme Court in Tyler Pipe stated as follows:

(continued...)

Tyler Pipe, 483 U.S. at 251-53. We applied the Chevron Oil factors and held that the decision invalidating the state tax should be applied prospectively only. The Supreme Court denied review of that decision. National Can Corp. v. Department of Revenue,

---

[3](...continued)

> The [Washington] Department of Revenue argues that any adverse decision in these cases should not be applied retroactively because the taxes at issue were assessed prior to our opinion in Armco and the holding in that case was not clearly foreshadowed by earlier opinions. See Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107 (1971) (factors to consider in deciding whether to impose decision prospectively only). The State's argument is similar to an argument advanced by the State of Hawaii in Bacchus Imports, Ltd. v. Dias, 468 U.S., at 276-277. The State urged that, if we invalidated the tax at issue, we should not require the payment of refunds to taxpayers. We did not resolve the merits of that issue, *concluding that this Court should not take it upon itself in this complex area of state tax structures to determine how to apply its holding*[.]

Tyler Pipe, 483 U.S. at 251-52 (emphasis added)

The Court concluded that "it is likewise appropriate for the Supreme Court of Washington to address in the first instance the refund issues raised by our rulings in these cases." Tyler Pipe, 483 U.S. at 253.

We understood that on remand this court was to decide the issue of retroactivity. National Can, 109 Wn.2d at 881. We decided refunds were not available to the parties before the court for taxes collected before the date of the Supreme Court's decision because the case should be given pure prospective application. National Can, 109 Wn.2d at 895.

109 Wn.2d 878, 749 P.2d 1286, appeal dismissed and cert. denied, 486 U.S. 1040 (1988). As a result, the litigant taxpayers in the Tyler Pipe case did not receive the benefit of the new rule with regard to taxes paid before the date of the Tyler Pipe decision. National Can, 109 Wn.2d at 895. In other words, the case was not given retroactive effect as to the litigant taxpayers or any other similarly situated taxpayers.

In Beam Distilling, the Supreme Court announced a new rule of law and retreated from its former Chevron Oil rule, holding that it is error to refuse to apply a rule of federal law retroactively *after the case announcing the rule has already done so*. It is important to recognize that the Beam Distilling Court held only that *when it applied a new rule to the parties then before the Court*, that rule should then be applied to all others not barred by res judicata or procedural requirements. Beam Distilling, 501 U.S. at 544.[4] Similarly, in Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 113 S. Ct. 2510, 2513, 125 L. Ed. 2d 74 (1993), the Court reiterated that the "Court's application of a rule of federal law to the parties before [it] requires every court to give retroactive effect to that decision." The Court held that a rule of federal law, once announced *and applied to the parties to the controversy*, must be given full retroactive effect by all courts adjudicating federal law. Harper, 113 S. Ct. at 2517; see also Reynoldsville Casket, 115 S. Ct. at 1748.

---

[4]The Supreme Court stated:

> The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata. We do not speculate as to the bounds or propriety of pure prospectivity.

Beam Distilling, 501 U.S. at 544 (Souter, J.).

The point is that in Tyler Pipe (the case announcing the new rule at issue here) the Supreme Court *did not apply the rule to the litigants before it*. It left open the issue of retroactivity for this court to decide. It did not, as the majority suggests, simply remand for a remedy; it also remanded for the determination of retroactivity. We decided that question under the then applicable law. The Supreme Court declined review and the case was closed. Nothing in Beam Distilling or Harper changes our decision. In the Beam Distilling and Harper decisions, the Court concluded that when it did not reserve the question whether its holding should be applied to the parties before it, the normal rule of retroactive application will be followed. Beam Distilling, 501 U.S. at 539; Harper, 113 S. Ct. at 2518. However, in Tyler Pipe the issue was reserved. The Supreme Court did not apply the rule to the parties before it; rather, it remanded to this court for the determination of retroactivity. It did not therefore mandate retroactive effect be given to that decision which decided a new rule of constitutional law. See National Can, 109 Wn.2d at 882-88.

The majority opinion results in a strange and unfair result. The parties that bore the cost and burden of litigating the constitutionality of the tax in the Tyler Pipe case did not receive tax refunds because the new rule (invalidating the tax) was only applied prospectively. However, the majority would now give retroactive application of this very same decision to taxpayers who were not involved in that litigation. This results in the very unfairness that the Supreme Court decried in Beam Distilling;[5]

---

[5]We understood this issue in Robinson v. City of Seattle, 119 Wn.2d 34, 77, 830 P.2d 318 (1992). We explained that

> under Beam Distilling, *retroactive application of a principle in a case announcing a new rule precludes prospective application of the rule in any subsequently raised suit based upon the new rule*. Such selective, or "modified", prospectivity would be unequal and unmindful of stare decisis as it treats similarly situated litigants unequally.

that is, that the new rule applied to the litigants but not to others similarly situated. Here the majority decision results in an even greater injustice because those that successfully litigated the issue in Tyler Pipe were denied the retroactive application of the new rule to past events while those unrelated to the case now receive retroactive application of the new rule to taxes they paid before the date the tax was declared unconstitutional. In Beam Distilling, the Court explained that principles of equality and stare decisis dictate that "similarly situated litigants should be treated the same," and therefore a new rule cannot be applied retroactively to some litigants when it is not applied retroactively to others. Beam Distilling, 501 U.S. at 540, 542-43 (Souter, J.).

I would hold that the Tyler Pipe decision has always had, and still does have, only prospective application. Because the Supreme Court did not apply the new rule of law to the litigants before it in that case, no law requires it be given retroactive effect as to others who were not before the Court. Additionally, I would apply the federal law which holds that new rules of federal law do not apply to cases which are otherwise final. Any other rule could play havoc with cases wherein new rules of law were applied only to cases not yet final.

I would affirm the trial court.

/s/ Richard P. Guy
RICHARD P. GUY
Justice

I agree

/s/ Barbara A. Madsen
BARBARA A. MADSEN
Justice

/s/ Rosselle Pekelis
ROSSELLE PEKELIS
Justice Pro Tem

I concur

/s/ Philip A. Talmadge
PHILIP A. TALMADGE
Justice

SUPREME COURT OF WASHINGTON

DIGITAL EQUIPMENT CORPORATION,
Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Respondent

No. 62414-3

ORDER DENYING MOTION FOR RECONSIDERATION

The Court having considered the Appellant's Motion for Reconsideration of Decision Terminating Review and the Respondent's Motion for Reconsideration;

Now, therefore, it is hereby

ORDERED:

That Appellant's Motion for Reconsideration of Decision Terminating Review and the Respondent's Motion for Reconsideration are both denied.

DATED at Olympia, Washington this 8th day of November, 1996.

/s/ James M. Dolliver
James M. Dolliver
for CHIEF JUSTICE

Superior Court of the State of Washington
For Thurston County

September 9, 1994

Mr. George C. Mastrodonato
Attorney at Law
Lane, Powell, Spears, Lubersky
Evergreen Plaza Building
711 Capitol Way
Olympia, Washington 98501

Mr. Donald F. Cofer
Assistant Attorney General
P. O. Box 40123
Olympia, Washington 98504-0123

Re *Digital Equipment Corporation v. State of Washington, Department of Revenue*
Thurston County Cause No. 87-2-01627-4

Opinion Letter

Dear Counsel:

This matter comes before the court on cross-motions for summary judgment. Plaintiff's motion is for partial summary judgment; defendant's motion is for dismissal. Even where opposing parties present cross-motions on a seemingly agreed set of facts, the court must first determine whether there are material issues of fact which must be resolved before addressing legal issues. I have done that in this case, applying the standard of judging the evidence in the light most favorable to first one party and then the other. Having done so, I conclude that as to the issues decided here there are no material issues of fact.

In deciding legal issues on summary judgment the first task of the court is to determine the appropriate standard for judging the legal issues before it. This is usually an obvious and unstated determination -- a trial court is bound to follow the rule of law announced by our courts of appeal in this state. That is the standard urged upon me by the department in this case. Among the arguments advanced by the department is the contention that this court is bound to follow the precedent established in National Can v. Department of Rev., 108 Wn.2d 878, 749 P.2d 1286 (1988) (National Can II). However, where federal law is directly in point and in conflict with state law, it is supreme. If directly in point and in conflict, the supremacy clause of the U.S. Constitution would require that this court consider and apply the rules of law announced by the U.S. Supreme Court in James B. Beam Distilling Co. v. Georgia, 501 U.S. ___, 115 L. Ed. 2d 481, 111 S. Ct. 2439 (1991); and Harper v. Virginia Dept. of Taxation, 509 U.S. ___, 125 L. Ed. 2d 74, 113 S. Ct. 2510 (1993). Digital argues that these two cases overturn National Can II, and among the arguments it makes, it contends that I should apply those decisions by virtue of the supremacy clause. I conclude that while both of those principles guide this court, the facts and legal issues of this case are such that a careful analysis of the issues should precede my decision. Without that analysis this court cannot simply apply National Can II on the basis of stare decisis, or Beam and Harper on the basis of the supremacy clause.

There are several important time frames in this case. The first of those, and the most important is the time frame from January 1, 1983 through June 23, 1987. It was during this period that most of the tax payments were made.

I conclude that the department is entitled to summary judgment dismissing the claim for tax payments made by Digital between January 1, 1993 [sic] and June 23, 1987. This summary judgment rests upon the authority of Tyler Pipe Indus., Inc. v. Department of Rev., 483 U.S. 232, 97 L. Ed. 2d 199, 107 S. Ct. 2810 (1987); and (National Can II).

The central issue in this determination is the impact of Beam and Harper upon National Can II. I conclude that the rule of law announced in Tyler was given purely prospective application by National Can II. The United States Supreme Court denied review of that determination, letting the decision stand. The subsequent cases decided by the United States Supreme Court, Beam and Harper, address selective prospectivity. The principle announced in Beam and Harper, distilled to its essence, is that a choice of law rule which treats similarly situated litigants differently is unconstitutional. The result announced here is not inconsistent with that principle. In fact, an opposite result would wreck havoc with the principle; it would result in opposite treatment for two similarly situated litigants (National Can and Digital), with the original litigant, National Can, getting the decidedly short end of this legal stick.

It is evident that Beam and Harper prohibit selective prospectivity. It is equally evident that the test of Chevron Oil Company v. Huson, 404 U.S. 97, 30 L. Ed. 2d 200, 104 S. Ct. 1049 (1971), remains valid for the rare case of pure prospectivity. Whether Tyler is a pure prospectivity case is the hard issue before this court. There is language in various U.S. Supreme Court decisions that support either side of that question. In the end, it is the principle announced in Beam and Harper that leads this court to conclude that Tyler was and will continue to be a case of pure prospectivity.

In Tyler, the Supreme Court declared:

> "Our partial invalidation of the State's taxing scheme raises remedial issues that are better addressed by the State Supreme Court on remand. Accordingly, we vacate the judgments of the Supreme Court of Washington and remand for further proceedings not inconsistent with this opinion."

97 L. Ed. 2d at 217. The act of remanding a tax case back to a state court is by no means a determination of the U.S. Supreme

Court that the case is to be applied in a purely prospective manner. Consider the court's declaration in Harper v. Virginia Department of Taxation, 125 L. Ed. 2d 74, 87 (1993):

> "In an effort to distinguish Davis, the Supreme Court of Virginia surmised that this Court had 'made no . . . ruling' about the application of the rule announced in Davis 'retroactively to the litigants in that case.' 242 Va., at 326, 410 SE2d, at 631. '[B]ecause the retroactivity issue was not decided in Davis,' the court believed that it was 'not foreclosed by precedent from applying the three-pronged Chevron Oil test in deciding the retroactivity issue is the present case.' Ibid.
>
> "We disagree. Davis did not hold that preferential state tax treatment of state and local employee pensions, though constitutionally invalid in the future, should be upheld as to all events predating the announcement of Davis. The governmental appellee in Davis 'conceded that a refund [would have been] appropriate' if we were to conclude that 'the Michigan Income Tax Act violate[d] principles of intergovernmental tax immunity by favoring retired state and local governmental employees over retired federal employees.' 489 US, at 817, 103 L. Ed. 2d 891, 109 S. Ct. 1500. We stated that 'to the extent appellant has paid taxes pursuant to this invalid tax scheme, he is entitled to a refund.' Ibid. Far from reserving the retroactivity question, our response to the appellee's concession constituted a retroactive application of the rule announced in Davis to the parties before the Court. Because a decision to accord solely prospective effect to Davis would have foreclosed any discussion of remedial issues, our 'consideration of remedial issues' meant 'necessarily' that we retroactively applied the rule we announced in Davis to the litigants before us.

> Beam, supra, at --, 115 L. Ed. 2d 481, 111 S. Ct. 2439 (opinion of Souter, J.). Therefore, under Griffith, Beam, and the retroactivity approach we adopt today, the Supreme Court of Virginia must apply Davis in petitioners' refund action."

The above passage is important for two reasons. First, by implication the Supreme Court validated the three-pronged Chevron Oil test for purely prospective choice of law questions. If the Chevron Oil Test was no longer valid, the Supreme Court would have rejected out-of-hand the approach taken by the Supreme Court of Virginia. Instead, it distinguished the Davis decision discussed therein from a case of pure prospectivity. The distinction would be important only if the Chevron Oil Test still applied to pure prospectivity. The above passage is important for a second reason in that it clearly separates remand for "consideration of remedial issues" from pure prospectivity. Remand of a tax case does not necessarily mean that the U.S. Supreme Court intends to leave the decision of pure prospectivity to a state court.

If Harper was the only evidence of the U.S. Supreme Court's intention in Tyler, one would conclude that Tyler was not a pure prospectivity case. However, Harper is not the only evidence. In American Trucking Assoc., Inc. v. Scheiner, 483 US 266, 297-298, 97 L. Ed. 2d 226, 107 S. Ct. 2829 (1987). The Supreme Court remanded a case back to the Supreme Court of Pennsylvania to consider whether the U.S. Supreme Court ruling on constitutionality, "should be applied retroactively and to decide other remedial issues." This case and language is cited by the Supreme Court in Beam (115 L. Ed. 2d at 490) as an example of reserving the issue of retroactivity to a state court. Significantly, in the Scheiner decision the Supreme Court cited Tyler as precedent for its remand. If Scheiner reserved the issue of pure prospectivity to the State Supreme Court, one may reasonably infer that the case cited as precedent, Tyler, is also considered a pure prospectivity case.

Beyond the implication of the Scheiner case, there is more direct evidence found in the language of National Can II. In introducing the discussion of the court's decision, Justice Utter wrote:

> "The decisive issues before this court are whether state law mandates refunds, and if not, whether this is an appropriate case for prospective application. We hold state law does not require refunds, and prospective application is appropriate."

109 Wn.2d at 880.

The U.S. Supreme Court denied review of this decision and let it stand. The denial of review is not binding precedent. It means only that the reviewing court affirms the outcome. However, the outcome in National Can II cannot be affirmed without accepting the ruling approving prospective application. If the U.S. Supreme Court intends that Tyler is to have retroactive application for Digital, it would then be accepting the very principle rejected in both Beam and Harper, that being that similarly situated litigants should not be treated differently.

For the above reasons the department is awarded summary judgment dismissing the claim for tax payments made by Digital between January 1, 1983 and June 23, 1987. The court reserves ruling on the other periods of time pending further argument.

Very truly yours,

/s/ Wm. Thomas McPhee
Wm. Thomas McPhee, Judge

IN THE SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

DIGITAL EQUIPMENT CORPORATION, Plaintiff, v. STATE OF WASHINGTON DEPARTMENT OF REVENUE, Defendant.	No. 87-2-01627-4 ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

THIS MATTER originally came before the Court on June 20, 1994, for hearing on Plaintiff's Motion for Partial Summary Judgment and on Defendant's Cross-Motion for Summary Judgment. On September 9, 1994, the Court issued a letter opinion concluding that Defendant is entitled to a summary judgment dismissing Plaintiff's refund claims relating to periods from January 1, 1983 to June 23, 1987, and reserving ruling on the parties' cross-motions for summary judgment for Plaintiff's remaining refund claims relating to periods June 23, 1987 to August 11, 1987 pending further oral argument. Plaintiff has abandoned any refund claims stated in its Amended Complaint for Refund of Taxes for periods after August 11, 1987.

On October 5, 1994, Plaintiff filed a Motion for Reconsideration and Supporting Memorandum, asking the Court to reconsider its letter opinion dated September 9, 1994. On October 24, 1994, the Court heard further oral argument concerning the matters reserved in that letter opinion and concerning the matters addressed in Plaintiff's motion for reconsideration. Thus, the parties' original cross-motions for summary judgment and Plaintiff's motion for reconsideration were

before the Court for hearing on October 24, 1994, and the Court heard argument concerning all of Plaintiff's refund claims, both those relating to periods from January 1, 1983 to June 23, 1987, and those relating to periods from June 23, 1987 to August 11, 1987.

On November 7, 1994, the Court issued a letter opinion concluding that Plaintiff's motion for reconsideration should be denied and that Defendant is entitled to a summary judgment concerning the matters reserved in the Court's previous letter opinion.

The Court considered the following materials in ruling on the parties' cross-motions for summary judgment:

1. Amended Complaint for Refund of Taxes, dated December 29, 1988;

2. Plaintiff Digital Equipment Corporation's Motion for Partial Summary Judgment, dated April 11, 1994;

3. Memorandum in Support of Plaintiff Digital Equipment Corporation's Motion for Partial Summary Judgment, dated April 11, 1994;

4. Declaration of R.S. Kuraska in Support of Motion for Partial Summary Judgment, dated April 6, 1994;

5. Affidavit of George C. Mastrodonato with Exhibits to Plaintiff's Memorandum in Support of Partial Summary Judgment, dated April 11, 1994;

6. Defendant's Cross-Motion for Summary Judgment, dated April 18, 1994;

7. Memorandum in Support of Cross-Motion for Summary Judgment, dated April 18, 1994;

8. Digital Equipment Corporation's Response to Department of Revenue Memorandum in Support of Cross-Motion for Summary Judgment, dated May 27, 1994;

9. Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, dated May 27, 1994;

10. Digital's Reply to Department's Memorandum in Opposition to Motion for Partial Summary Judgment, dated June 10, 1994; and

11. Reply Memorandum in Support of Defendant's Cross-Motion for Summary Judgment, dated June 10, 1994.

The Court considered the following materials in ruling on Plaintiff's motion for reconsideration:

1. Motion for Reconsideration and Supporting Memorandum, dated October 5, 1994;

2. Memorandum in Opposition to Plaintiff's Motion for Reconsideration, dated October 14, 1994; and

3. Plaintiff's Reply Memorandum in Support of Motion for Reconsideration, dated October 21, 1994.

The Court, having considered the above-listed materials and the oral arguments presented by the respective counsel, deems itself fully advised in the premises. Now, therefore, for the reasons outlined in the Court's letter opinion dated September 9, 1994, and the Court's letter opinion dated November 7, 1994, the Court hereby:

ORDERS, ADJUDGES AND DECREES that Plaintiff's Motion for Reconsideration is hereby DENIED. The Court further

ORDERS, ADJUDGES AND DECREES that because the materials considered by the Court show there is no genuine issue as to any material fact and as a matter of law Defendant is entitled

to summary judgment as to all Plaintiff's claims in this action, Defendant's Cross-Motion for Summary Judgment is hereby GRANTED, Plaintiff's Motion for Partial Summary Judgment is hereby DENIED, and this action is hereby DISMISSED WITH PREJUDICE. The Court further

ORDERS, ADJUDGES AND DECREES that Defendant shall have its taxable costs.

This Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Reconsideration constitutes a final judgment in this action.

DATED this 18th day of November, 1994.

/s/ Wm. Thomas McPhee
JUDGE WM. THOMAS McPHEE

Presented by:

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

/s/ Donald F. Cofer
DONALD F. COFER
Senior Counsel
WSBA # 10896
Attorneys for Defendant

Approved as to form; notice of
presentation waived; copy received:

LANE POWELL SPEARS LUBERSKY

/s/ George C. Mastrodonato
GEORGE C. MASTRODONATO
WSBA # 7483
Attorneys for Plaintiff

SSB 3678

AN ACT Relating to revenue and excise taxation; amending RCW 82.04.440; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. Section 82.04.440, chapter 15, Laws of 1961 as last amended by section 5, chapter 172, Laws of 1981 and RCW 82.04.440 are each amended to read as follows:

(1) Except as provided in subsections (2) and (3) of this section, every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in((: ~~PROVIDED, that~~)).

(2) (a) Persons taxable under RCW 82.04.250 or 82.04.270 shall not be taxable under RCW 82.04.230, 82.04.240 or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing of the products so sold((; ~~and that~~)).

(b) If (a) of this subsection is held by a state or federal court, in a final judgment unappealed from, to result in discrimination against interstate or foreign commerce, this entire subsection shall be null and void.

(3) Persons taxable under RCW 82.04.240 or ((~~RCW~~)) 82.04.260 subsection (4) shall not be taxable under RCW 82.04.230 with respect to extracting the ingredients of the products so manufactured.

(4) Every person taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5) or (7) of RCW 82.04.260 with respect to extracting or manufacturing products in this state shall be allowed a credit against those taxes for any gross

receipts taxes paid to another state with respect to the sales of the products so extracted or manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the extraction or manufacturing of those products. This subsection shall apply to tax reporting periods after July 1, 1985.

(a) For the purpose of this subsection, the term "gross receipts tax" means a tax:

(i) Which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which the deductions allowed would not constitute the tax an income or value added tax; and

(ii) Which is also not, pursuant to law or custom, separately stated from the sales price.

(b) For the purpose of this subsection, the term "state" means state of the United States, any political subdivision thereof, or the District of Columbia, and any foreign country or political subdivision thereof.

NEW SECTION. Sec. 2. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

WASHINGTON LAWS, 1985

CHAPTER 190
[Engrossed Substitute Senate Bill No. 3678]
BUSINESS AND OCCUPATION TAX—CREDIT FOR TAXES PAID TO ANOTHER STATE FOR SALES OF PRODUCTS EXTRACTED OR MANUFACTURED IN-STATE

AN ACT Relating to revenue and taxation; amending RCW 82.04.440, 82.49.010, 82.49.030; adding a new section to chapter 82.12 RCW; adding a new section to chapter 82.49 RCW; creating a new section; repealing RCW 82.49.040, 82.49.050, and 82.49.060; providing an effective date; and declaring and emergency.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. Section 82.04.440, chapter 15, Laws of 1961 as last amended by section 5, chapter 172, Laws of 1981 and RCW 82.04.440 are each amended to read as follows:

(1) Except as provided in subsections (2) and (3) of this section, every person engaged in activities which are within the purview of the provisions of two or more sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in((: ~~PROVIDED, That~~)).

(2) Persons taxable under RCW 82.04.250 or 82.04.270 shall not be taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing of the products so sold((; ~~and that~~)).

(3) Persons taxable under RCW 82.04.240 or ((~~RCW~~)) 82.04.260 subsection (4) shall not be taxable under RCW 82.04.230 with respect to extracting the ingredients of the products so manufactured.

(4)(a) If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that subsection (2) of this section results in an unconstitutional discrimination against interstate or foreign commerce, and that relief is appropriate for any tax reporting periods either before or after the effective date of this 1985 act, it is the intent of the legislature that the credit provided in (b) of this subsection shall be applied to such reporting periods and that relief for such periods be limited to the granting of such credit. It is further the intent of the legislature that such credit shall be applicable only under the conditions and to the extent provided in this subsection (4).

(b) As provided in (a) of this subsection, a person taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing products in this state shall be allowed a credit against those taxes for any gross receipts taxes paid to another state with respect to the sales of the products so extracted or manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the extraction or manufacturing of those products.

(c) For the purpose of this subsection, "gross receipts tax" means a tax:

(i) Which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which the deductions allowed would not constitute the tax an income tax or value added tax; and

(ii) Which is also not, pursuant to law or custom, separately stated from the sales price.

(d) For the purpose of this subsection, "state" means state of the United States, any political subdivision thereof, or the District of Columbia, and any foreign country or political subdivision thereof.

WASHINGTON LAWS, 1987 2nd Ex. Sess.

CHAPTER 3
[Senate Bill No. 6078]
BUSINESS AND OCCUPATION TAX—
MULTIPLE ACTIVITIES—TAX CREDITS

AN ACT Relating to business and occupation taxation of multiple activities; amending RCW 82.04.440; creating new sections; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. The legislature finds that the invalidation of the multiple activities exemption contained in RCW 82.04.440 by the United States Supreme Court now requires adjustments to the state's business and occupation tax to achieve constitutional equality between Washington taxpayers who have conducted and will continue to conduct business in interstate and intrastate commerce. It is the intent of this act to preserve the integrity of Washington's business and occupation tax system and impose only that financial burden upon the state necessary to establish parity in taxation between such taxpayers.

Thus, this act extends the system of credits originated in RCW 82.04.440 in 1985 to provide for equal treatment of taxpayers engaging in extracting, manufacturing or selling regardless of the location in which any of such activities occurs. It is further intended that RCW 82.04.440, as amended by section 2 of this act, shall be construed and applied in a manner that will eliminate unconstitutional discrimination between taxpayers and ensure the preservation and collection of revenues from the conduct of multiple activities in which taxpayers in this state may engage.

Sec. 2. Section 82.04.440, chapter 15, Laws of 1961 as last amended by section 1, chapter 190, Laws of 1985 and RCW 82.04.440 are each amended to read as follows:

(1) ((~~Except as provided in subsections (2) and (3) of this section,~~)) Every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in.

(2) Persons taxable under RCW 82.04.250 or 82.04.270 shall ((~~not be taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing of the products so sold~~)) be allowed a credit against those taxes for any (a) manufacturing taxes paid with respect to the manufacturing of products so sold in this state, and/or (b) extracting taxes paid with respect to the extracting of products so sold in this state or ingredients of products so sold in this state. Extracting taxes taken as credit under subsection (3) of this section may also be taken under this subsection, if otherwise allowable under this subsection. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the sale of those products.

(3) Persons taxable under RCW 82.04.240 or 82.04.260 subsection (4) ((~~shall not be taxable under RCW 82.04.230~~)) be allowed a credit against those taxes for any extracting taxes paid with respect to extracting the ingredients of the products so manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the manufacturing of those products.

(4) (((~~(a) If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that subsection (2) of this section results in an unconstitutional discrimination against interstate or foreign commerce, and that relief is appropriate for any tax reporting periods either before or after April 30, 1985, it is the intent of the legislature that the credit provided in (b) of this subsection shall be applied to such reporting periods and that relief for such periods be limited to the granting of such credit. It is further the intent of the legislature that such credit shall be applicable only under the conditions and to the extent provided in this subsection (4):~~

~~(b) As provided in (a) of this subsection,~~)) Persons taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing products in this state shall be allowed a credit against those taxes for any (i) gross receipts taxes paid to another state with respect to the sales of the products so extracted or manufactured in this state, (ii) manufacturing taxes paid with respect to the manufacturing of products using ingredients so extracted in this state, or (iii) manufacturing taxes paid with respect to manufacturing activities completed in another state for products so manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the extraction or manufacturing of those products.

(((~~(c)~~))) (5) For the purpose of this ((~~subsection,~~)) section:

(a) "Gross receipts tax" means a tax:

(i) Which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which the deductions allowed would not constitute the tax an income tax or value added tax; and

(ii) Which is also not, pursuant to law or custom, separately stated from the sales price.

(((~~(d) For the purpose of this subsection,~~)) (b) "State" means (i) the state of Washington, (ii) a state of the United States other than Washington, or any political subdivision ((~~thereof, or~~)) of such other state, (iii) the District of Columbia, and (iv) any foreign country or political subdivision thereof.

(c) "Manufacturing tax" means a gross receipts tax imposed on the act or privilege of engaging in business as a manufacturer, and includes (i) the taxes imposed in RCW 82.04.240 and subsections (2), (3), (4), (5), and (7) of RCW 82.04.260, and (ii) similar gross receipts taxes paid to other states.

(d) "Extracting tax" means a gross receipts tax imposed on the act or privilege of engaging in business as an extractor, and includes the tax imposed in RCW 82.04.230 and similar gross receipts taxes paid to other states.

(e) "Business", "manufacturer", "extractor", and other terms used in this section have the meanings given in RCW 82.04.020 through 82.04.212, notwithstanding the use of those terms in the context of describing taxes imposed by other states.

NEW SECTION. Sec. 3. If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that relief is appropriate for any tax reporting periods before the effective date of this act, in respect to RCW 82.04.440 as it existed before the effective date of this act, it is the intent of the legislature that the credits provided in RCW 82.04.440 as amended by section 2 of this act shall be applied to such reporting periods and that relief for such periods be limited to the granting of such credits.

NEW SECTION. Sec. 4. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 5. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the Senate August 10, 1987.
Passed the House August 10, 1987.
Approved by the Governor August 11, 1987.
Filed in Office of Secretary of State August 11, 1987.

REVISED CODE OF WASHINGTON (RCW)

82.32.060 Excess payment of tax, penalty, or interest—Credit or refund—Payment of judgments for refund. (1) If, upon receipt of an application by a taxpayer for a refund or for an audit of the taxpayer's records, or upon an examination of the returns or records of any taxpayer, it is determined by the department that within the statutory period for assessment of taxes, penalties, or interest prescribed by RCW 82.32.050 any amount of tax, penalty, or interest has been paid in excess of that properly due, the excess amount paid within, or attributable to, such period shall be credited to the taxpayer's account or shall be refunded to the taxpayer, at the taxpayer's option. Except as provided in subsections (2) and (3) of this section, no refund or credit shall be made for taxes, penalties, or interest paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed.

(2) The execution of a written waiver under RCW 82.32.050 or 82.32.100 shall extend the time for making a refund or credit of any taxes paid during, or attributable to, the years covered by the waiver if, prior to the expiration of the waiver period, an application for refund of such taxes is made by the taxpayer or the department discovers a refund or credit is due.

(3) Notwithstanding the foregoing limitations there shall be refunded or credited to taxpayers engaged in the performance of United States government contracts or subcontracts the amount of any tax paid, measured by that portion of the amounts received from the United States, which the taxpayer is required by contract or applicable federal statute to refund or credit to the United States, if claim for such refund is filed by the taxpayer with the department within one year of the date that the amount of the refund or credit due to the United States is finally determined and filed within four years of the date on which the tax was paid: PROVIDED, That no interest shall be allowed on such refund.

(4) Any such refunds shall be made by means of vouchers approved by the department and by the issuance of state warrants drawn upon and payable from such funds as the legislature may provide. However, taxpayers who are required to pay taxes by electronic funds transfer under RCW 82.32.080 shall have any refunds paid by electronic funds transfer.

(5) Any judgment for which a recovery is granted by any court of competent jurisdiction, not appealed from, for tax, penalties, and interest which were paid by the taxpayer, and costs, in a suit by any taxpayer shall be paid in the same manner, as provided in subsection (4) of this section, upon the filing with the department of a certified copy of the order or judgment of the court. Except as to the credits in computing tax authorized by RCW 82.04.435, interest at the rate of three percent per annum shall be allowed by the department and by any court on the amount of any refund, credit, or other recovery allowed to a taxpayer for taxes, penalties, or interest paid by the taxpayer before January 1, 1992. For refunds or credits of amounts paid or other recovery allowed to a taxpayer after December 31, 1991, the rate of interest shall be the rate as computed for assessments under RCW 82.32.050(2), less one percentage point. [1992 c 169 § 2; 1991 c 142 § 10; 1990 c 69 § 1; 1989 c 378 § 20; 1979 ex.s. c 95 § 4; 1971 ex.s. c 299 § 17; 1965 ex.s. c 173 § 27; 1963 c 22 § 1; 1961 c 15 § 82.32.060. Prior: 1951 1st ex.s. c 9 § 6; 1949 c 228 § 21; 1935 c 180 § 189; Rem. Supp. 1949 § 8370-189.]

. . . .

82.32.090 Late payment—Disregard of written instructions—Evasion—Penalties. ***(Effective until January 1, 1997.)*** (1) If payment of any tax due on a return to be filed by a taxpayer is not received by the department of revenue by the due date, there shall be assessed a penalty five percent of the amount of the tax; and if the tax is not received within thirty days after the due date, there shall be assessed a total penalty of ten percent of the amount of the tax; and if the tax is not received within sixty days after the due date, there shall be assessed a total penalty of

twenty percent of the amount of the tax. No penalty so added shall be less than five dollars.

(2) If payment of any tax assessed by the department of revenue is not received by the department by the due date specified in the notice, or any extension thereof, the department shall add a penalty of ten percent of the amount of the additional tax found due. No penalty so added shall be less than five dollars.

(3) If a warrant be issued by the department of revenue for the collection of taxes, increases, and penalties, there shall be added thereto a penalty of five percent of the amount of the tax, but not less than ten dollars.

(4) If the department finds that all or any part of a deficiency resulted from the disregard of specific written instructions as to reporting or tax liabilities, the department shall add a penalty of ten percent of the amount of the additional tax found due because of the failure to follow the instructions. A taxpayer disregards specific written instructions when the department of revenue has informed the taxpayer in writing of the taxpayer's tax obligations and the taxpayer fails to act in accordance with those instructions unless the department has not issued final instructions because the matter is under appeal pursuant to this chapter or departmental regulations. The department shall not assess the penalty under this section upon any taxpayer who has made a good faith effort to comply with the specific written instructions provided by the department to that taxpayer. Specific written instructions may be given as a part of a tax assessment, audit, determination, or closing agreement, provided that such specific written instructions shall apply only to the taxpayer addressed or referenced on such documents. Any specific written instructions by the department of revenue shall be clearly identified as such and shall inform the taxpayer that failure to follow the instructions may subject the taxpayer to the penalties imposed by this subsection.

(5) If the department finds that all or any part of the deficiency resulted from an intent to evade the tax payable

hereunder, a further penalty of fifty percent of the additional tax found to be due shall be added.

(6) The aggregate of penalties imposed under this section for failure to pay a tax due on a return by the due date, late payment of any tax, increase, or penalty, or issuance of a warrant shall not exceed thirty-five percent of the tax due, or twenty dollars, whichever is greater.

(7) The department of revenue may not impose both the evasion penalty and the penalty for disregarding specific written instructions on the same tax found to be due. [1992 c 206 § 3; 1991 c 142 § 11; 1987 c 502 § 9; 1983 2nd ex.s. c 3 § 23; 1983 c 7 § 32; 1981 c 172 § 8; 1981 c 7 § 2; 1971 ex.s. c 179 § 1; 1967 ex.s. c 149 § 26; 1965 ex.s. c 141 § 3; 1963 ex.s. c 28 § 7; 1961 c 15 § 82.32.090. Prior: 1959 c 197 § 12; 1955 c 110 § 1; 1951 1st ex.s. c 9 § 9; 1949 c 228 § 23; 1937 c 227 § 18; 1935 c 180 § 192; Rem. Supp. 1949 § 8370-192.]

. . . .

82.32.150 Contest of tax—Prepayment required—Restraining orders and injunctions barred. All taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest. No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax or penalty or any part thereof, except upon the ground that the assessment thereof was in violation of the Constitution of the United States or that of the state. [1961 c 15 § 82.32.150. Prior: 1935 c 180 § 198; RRS § 8370-198.]

82.32.160 Correction of tax—Administrative procedure—Conference—Determination by department. Any person having been issued a notice of additional taxes, delinquent taxes, interest, or penalties assessed by the department, may within thirty days after the issuance of the original notice of the amount thereof or within the period covered by any extension of the due date thereof granted by the department petition the department in

writing for a correction of the amount of the assessment, and a conference for examination and review of the assessment. The petition shall set forth the reasons why the correction should be granted and the amount of the tax, interest, or penalties, which the petitioner believes to be due. The department shall promptly consider the petition and may grant or deny it. If denied, the petitioner shall be notified by mail thereof forthwith. If a conference is granted, the department shall fix the time and place therefor and notify the petitioner thereof by mail. After the conference the department may make such determination as may appear to it to be just and lawful and shall mail a copy of its determination to the petitioner. If no such petition is filed within the thirty-day period the assessment covered by the notice shall become final.

The procedures provided for herein shall apply also to a notice denying, in whole or in part, an application for a pollution control tax exemption and credit certificate, with such modifications to such procedures established by departmental rules and regulations as may be necessary to accommodate a claim for exemption or credit. [1989 c 378 § 22; 1975 1st ex.s. c 158 § 4; 1967 ex.s. c 26 § 49; 1963 ex.s. c 28 § 8; 1961 c 15 § 82.32.160. Prior: 1939 c 225 § 29, part; 1935 c 180 § 199, part; RRS § 8370-199, part.]

. . . .

82.32.180 Court appeal—Procedure. Any person, except one who has failed to keep and preserve books, records, and invoices as required in this chapter and chapter 82.24 RCW, having paid any tax as required and feeling aggrieved by the amount of the tax may appeal to the superior court of Thurston county, within the time limitation for a refund provided in chapter 82.32 RCW or, if an application for refund has been made to the department within that time limitation, then within thirty days after rejection of the application, whichever time limitation is later. In the appeal the taxpayer shall set forth the amount of the tax imposed upon the taxpayer which the taxpayer concedes to be the correct tax and the reason why the tax should be reduced or

abated. The appeal shall be perfected by serving a copy of the notice of appeal upon the department within the time herein specified and by filing the original thereof with proof of service with the clerk of the superior court of Thurston county.

The trial in the superior court on appeal shall be de novo and without the necessity of any pleadings other than the notice of appeal. The burden shall rest upon the taxpayer to prove that the tax as paid by the taxpayer is incorrect, either in whole or in part, and to establish the correct amount of the tax. In such proceeding the taxpayer shall be deemed the plaintiff, and the state, the defendant; and both parties shall be entitled to subpoena the attendance of witnesses as in other civil actions and to produce evidence that is competent, relevant, and material to determine the correct amount of the tax that should be paid by the taxpayer. Either party may seek appellate review in the same manner as other civil actions are appealed to the appellate courts.

It shall not be necessary for the taxpayer to protest against the payment of any tax or to make any demand to have the same refunded or to petition the director for a hearing in order to appeal to the superior court, but no court action or proceeding of any kind shall be maintained by the taxpayer to recover any tax paid, or any part thereof, except as herein provided.

The provisions of this section shall not apply to any tax payment which has been the subject of an appeal to the board of tax appeals with respect to which appeal a formal hearing has been elected. [1992 c 206 § 4; 1989 c 378 § 23; 1988 c 202 § 67; 1971 c 81 § 148; 1967 ex.s. c 26 § 51; 1965 ex.s. c 141 § 5; 1963 ex.s. c 28 § 9; 1961 c 15 § 82.32.180. Prior: 1951 1st ex.s. c 9 § 12; 1939 c 225 § 29, part; 1935 c 180 § 199, part; RRS § 8370-199, part.]

. . . .

82.32.210 Tax warrant—Filing—Lien—Effect. If any fee, tax, increase, or penalty or any portion thereof is not paid within fifteen days after it becomes due, the department of revenue

may issue a warrant under its official seal in the amount of such unpaid sums, together with interest thereon at the rate of one percent of the amount of such warrant for each thirty days or portion thereof after the date of such warrant. If, however, the department of revenue believes that a taxpayer is about to cease business, leave the state, or remove or dissipate the assets out of which fees, taxes or penalties might be satisfied and that any tax or penalty will not be paid when due, it may declare the fee, tax or penalty to be immediately due and payable and may issue a warrant immediately.

The department shall file a copy of the warrant with the clerk of the superior court of any county of the sate in which real and/or personal property of the taxpayer may be found. Upon filing, the clerk shall enter in the judgment docket, the name of the taxpayer mentioned in the warrant and in appropriate columns the amount of the fee, tax or portion thereof and any increases and penalties for which the warrant is issued and the date when the copy is filed, and thereupon the amount of the warrant so docketed shall become a specific lien upon all goods, wares, merchandise, fixtures, equipment, or other personal property used in the conduct of the business of the taxpayer against whom the warrant is issued, including property owned by third persons who have a beneficial interest, direct or indirect, in the operation of the business, and no sale or transfer of the personal property in any way affects the lien. The lien shall not be superior, however, to bona fide interests of third persons which had vested prior to the filing of the warrant when the third persons do not have a beneficial interest, direct or indirect, in the operation of the business, other than the securing of the payment of a debt or the receiving of a regular rental on equipment: PROVIDED, HOWEVER, That the phrase "bona fide interests of third persons" does not include any mortgage of real or personal property or any other credit transaction that results in the mortgagee or the holder of the security acting as trustee for unsecured creditors of the taxpayer mentioned in the warrant who executed the chattel or real property mortgage or the document evidencing the credit transaction. The amount of the warrant so docketed shall thereupon also become a lien upon the title to and interest in all other real and personal

property of the taxpayer against whom it is issued the same as a judgment in a civil case duly docketed in the office of the clerk. The warrant so docketed shall be sufficient to support the issuance of writs of garnishment in favor of the state in the manner provided by law in the case of judgments wholly or partially unsatisfied. [1987 c 405 § 15; 1983 1st ex.s. c 55 § 8; 1967 ex.s. c 89 § 3; 1961 c 15 § 82.32.210. Prior: 1955 c 389 § 38; prior: 1951 1st ex.s. c 9 § 13; 1949 c 228 § 225, part; 1937 c 227 § 20, part; 1935 c 180 § 202, part; Rem. Supp. 1949 § 8370-202, part.]

. . . .

82.32.220 Execution of warrant—Levy upon property—Satisfaction. The department of revenue may issue an order of execution, pursuant to a filed warrant, under its official seal directed to the sheriff of the county in which the warrant has been filed, commanding him to levy upon and sell the real and/or personal property of the taxpayer found within his county, or so much thereof as may be necessary, for the payment of the amount of the warrant, plus the cost of executing the warrant, and return the warrant to the department of revenue and pay to it the money collected by virtue thereof within sixty days after the receipt of the warrant. The sheriff shall thereupon proceed upon the same in all respects and with like effect as prescribed by law with respect to execution or other process issued against rights or property upon judgments of the superior court.

The sheriff shall be entitled to fees as provided by law for his services in levying execution on a superior court judgment and the clerk shall be entitled to a filing fee as provided by law, which shall be added to the amount of the warrant.

The proceeds received from any sale shall be credited upon the amount due under the warrant and when the final amount due is received, together with interest, penalties, and costs, the judgment docket shall show the claim for taxes to be satisfied and the clerk of the court shall so note upon the docket. Any surplus received from any sale of property shall be paid to the taxpayer or to any lien holder entitled thereto. If the return on the warrant

shows that the same has not been satisfied in full, the amount of the deficiency shall remain the same as a judgment against the taxpayer which may be collected in the same manner as the original amount of the warrant. [1983 1st ex.s. c 55 § 10; 1961 c 304 § 6; 1961 c 15 § 82.32.220. Prior: 1955 c 389 § 39; prior: 1951 1st ex.s. c 9 § 14; 1949 c 228 § 25, part; 1937 c 227 § 20, part; 1935 c 180 § 202, part; Rem. Supp. 1949 § 8370-202, part.]

. . . .

82.32.290 Unlawful acts—Penalties. (1)(a) It shall be unlawful:

(i) For any person to engage in business without having obtained a certificate of registration as provided in this chapter;

(ii) For the president, vice-president, secretary, treasurer, or other officer of any company to cause to permit the company to engage in business without having obtained a certificate of registration as provided in this chapter;

(iii) For any person to tear down or remove any order or notice posted by the department;

(iv) For any person to aid or abet another in any attempt to evade the payment of any tax or any part thereof;

(v) For any purchaser to fraudulently sign a resale certificate without intent to resell the property purchased; or

(vi) For any person to fail or refuse to permit the examination of any book, paper, account, record, or other data by the department or its duly authorized agent; or to fail or refuse to permit the inspection or appraisal of any property by the department or its duly authorized agent; or to refuse to offer testimony or produce any record as required.

(b) Any person violating any of the provisions of this subsection (1) shall be guilty of a gross misdemeanor in accordance with chapter 9A.20 RCW.

(2)(a) It shall be unlawful:

(i) For any person to engage in business after revocation of a certificate of registration;

(ii) For the president, vice-president, secretary, treasurer, or other office of any company to cause or permit the company to engage in business after revocation of a certificate of registration; or

(iii) For any person to make any false or fraudulent return or false statement in any return, with intent to defraud the state or evade the payment of any tax or part thereof.

(b) Any person violating any of the provisions of this subsection (2) shall be guilty of a class C felony in accordance with chapter 9A.20 RCW.

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DIGITAL EQUIPMENT CORPORATION,

Plaintiff,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,

Defendant.

(EXCERPTED)

VIDEOTAPED PROCEEDINGS

OCTOBER 27, 1995

ORAL ARGUMENTS

FOR THE PLAINTIFF, MICHAEL B. KING

FOR THE DEFENDANT, DONALD COFFER, AAG

[8:9-9:1]

JUSTICE TALMADGE: Counsel, is that your case? In your particular situation, did your client actually pay out-of-state gross receipt taxes on its manufacturing operations?

MR. KING: We were not actually double taxed, but that goes to the question of remedy, Your Honor.

JUSTICE TALMADGE: Counsel, then, doesn't that point out the fact that the reason the litigants in Tyler Pipe initiated the lawsuit and ultimately secured the remedy they sought was because they were adversely affected by the fact that they paid out-of-state gross receipts tax unconstitutionally? They blazed the trail, and now you come along and argue for a refund when you weren't even harmed in the way that prompted the original litigants to file suit.

MR. KING: Well, Your Honor's question introduces a second issue, and that's the nature of the harm. Let me answer that in two parts.

. . . .

[9:13-10:18]

Now, as to the question of injury, I think we're missing a fundamental point here if we buy into the state's analysis that somehow we're asking for a windfall, to be given back money when we weren't injured.

We most certainly were injured. Digital's money was taken under color of taxing authority later held to be unconstitutional. And it has long been the law, and the United States Supreme Court has repeatedly held as a general proposition that a taxpayer is entitled to return of its money in such circumstances.

This is the way the court put the matter in Ward v. Love County, a case that was cited with approval in McKesson and Reich.

It is a well settled rule that money got through imposition may be recovered back. And, as this Court has said on several occasions, the obligation to do justice rests upon all persons, natural or artificial. And if a county -- in that case a county -- obtains the money or property of others without authority, the law independent of any statute will compel restitution or compensation. To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate property arbitrarily and without due process of law. Of course this would be in controversion [sic] of the Fourteenth Amendment which binds the county as an agency of the state.

Our injury is that our money was taken from us without proper authority. We are presumptively under the Fourteenth Amendment, the due process clause -- Digital, I should say -- is entitled to the return of that money.

[35:9-39:4]

JUSTICE ALEXANDER: Counsel, the Attorney General says you have a remedy under 82.04.440 for any -- to redress any grievance you have. Why aren't you happy with that?

MR. KING: Well, we're not happy with it, Your Honor, because the application of that remedy, even if it's allowed by state law, will violate the due process clause. The due process clause requires that when somebody's money is taken from them illegally, it must be returned. There are only three exceptions to that.

Number one, if there is a pre-deprivation alternative to the pay-and-sue course. You know, most of us in almost all circumstances in all states, what we've got to do is if our taxes are taken from us and we don't think it -- if our money is taken from us as taxes and we don't think it's right, then we've got to pay and

sue to get it back. The due process clause says if there's a pre-deprivation alternative to that, then a refund can be denied.

There is no such alternative available. This Department has never contended that there was such an alternative available. At the time that Digital paid its tax, the remedy, and the only remedy, was the pay-and-sue remedy.

The second exception is that in these commerce clause and intergovernmental immunity situations, where there's an invalidation because of facial discrimination, the due process clause will allow a state, if it otherwise has the authority, to impose an adjusting retroactive tax on the benefit of local taxpayers. The Department has never claimed it's going to do that. The Department has never claimed it has the authority to do that. That alternative is also not before the Court.

There is only one other circumstance under which the due process clause allows a refund to be denied. That is if, as the Reynoldsville court said, there is a preexisting separate and independent rule of state law that provides a basis for denying the refund. For example, suppose a state has a protest requirement, you you've got to formally protest when you pay your taxes if you want to get them back. We only have that in this state for the ad valorem property taxes. RCW 82.32.060 expressly says you don't have to protest.

The credit law is the antithesis of a preexisting separate and independent rule of law. It was adopted after the taxes were paid. It was adopted precisely in order to avoid having to give refunds if the United States Supreme Court down the line said there has to be retroactive relief.

JUSTICE PEKELIS: Where does the McKesson test fit in, this meaningful backward relief?

MR. KING: I think the McKesson test, Your Honor, was the court's reminder -- and it hadn't dealt with the issues for a long time and finally it felt it had to do so -- that the due process clause

imposes limits on the ability of a state to deny a remedy. And McKesson said there must be meaningful backward-looking relief, but in that case it was dealing with a situation where the taxpayers were saying, we want a refund for the difference in the tax we pay. It didn't have to confront this broader issue that's presented with this case.

Reich and Reynoldsville come down the line, and in Reich the court says there's an additional element here: You may not reconfigure the remedy after the fact to deny the refund remedy that was previously available. Reynoldsville then further articulates this point, and it says --

JUSTICE PEKELIS: Counsel, does due process even apply? I mean, is there a violation of due process even when there isn't a hearing and there isn't all the indicia of due process but there is no injury?

MR. KING: There is injury, Your Honor. See, that's where we're going wrong here. It's this whole windfall business. The state says these people are going to get a windfall. The state's assumption is that it's the state's money and we just want it back. It's our money.

The United States Supreme Court in McKesson and Reich reviewed a series of cases from the teens and twenties and thirties: Ward v. Love County, Carpenter v. Shaw and others. In those cases -- and I quoted the Ward v. Love County case for you. In those cases the United States Supreme Court said what used to be recognized as a fundamental principal -- and I think that some advocates on the part of state departments of revenue lost track of it -- when your money is taken from you without authority of law that's an injury. The due process clause forbids it. You are entitled to a refund. It's a basic principal of restitution. Somebody takes something from you without color of law, you're entitled to the money back. That's our injury.

In Tyler Pipe many of the litigants weren't double taxed, but they were claiming for refunds as well. So, in fact, there is

not a question of windfall here for a noninjury. The injury is the taking of the money without authority of law. The due process clause presumes that you get a refund.